

No. 15091

United States
Court of Appeals
for the Ninth Circuit

See Vol. - 29691

PACIFIC-ATLANTIC STEAMSHIP COM-
PANY, a corporation, Appellant,

VS.

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison, de-
ceased, Appellee.

Transcript of Record

(In Two Volumes)

VOLUME I.

Pages 1 to 290, Inclusive

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

SEP 11 1956

PAUL P. O'BRIEN, CLERK



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for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellant:

LASHER B. GALLAGHER,

111 Sutter Street,

San Francisco 4, California.

Attorneys for Appellee:

RAYMOND C. SIMPSON,

GEORGE E. WISE,

ROBERT J. KILPATRICK,

SIMPSON, WISE & KILPATRICK,

355 Ocean Center Building,

Long Beach 2, California.



In the District Court of the United States, Southern District of California, Central Division

No. 13,569-T

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison, deceased,
Plaintiff,

vs.

PACIFIC-ATLANTIC STEAMSHIP CO., a corporation, etc., et al.,
Defendants.

FIRST AMENDED COMPLAINT FOR PERSONAL INJURIES AND WRONGFUL DEATH UNDER JONES ACT

Comes Now the Plaintiff, Emma Hutchison, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased, and complains of the Defendants and for first cause of action alleges:

I.

That this action is maintained under the provisions of Section 33 of the Merchant Marine Act of 1920, commonly known as the "Jones Act," and all statutes amendatory and supplemental thereto.

II.

That on the 8th day of October, 1951, the Plaintiff, Emma Hutchison, by order of the Superior Court of the State of California in and for the County of Kings, was duly appointed Administra-

trix of the estate of Nathanael Patrick Hutchison, deceased, who died on or about the 30th day of April, 1951, and thereupon duly executed bond and took the oath as required by law, and Letters of Administration were thereafter duly issued to her as such Administratrix, and that said Letters of Administration have not been revoked; that deceased left him surviving, the Plaintiff, his wife, as dependent.

III.

That at all times herein mentioned the Defendant Pacific-Atlantic Steamship Co. was, and now is, a corporation organized under the laws of the State of Delaware, and engaged in and doing business within the State of California and the jurisdiction of this court.

IV.

That at all times hereinafter mentioned the Defendant Pacific-Atlantic Steamship Co. operated, controlled, and managed the steamship "Linfield Victory", and used it for transportation of freight for hire by water in interstate commerce and coastwise trade.

V.

That the true names and capacities, whether individual, corporate, associate or otherwise, of Defendants Doe I Company, Doe II Company, Doe III Company, Doe IV, Doe V, and Doe VI are unknown to Plaintiff, and therefore Plaintiff sues said Defendants by such fictitious names, and will ask leave to amend this Complaint to show their true

names and capacities and facts pertaining to the wrongful conduct of said Defendants when same have been ascertained.

VI.

That Plaintiff is informed and believes, and therefore alleges, that at all times hereinafter mentioned the Defendants Doe I Company, Doe II Company and Doe III Company, operated, controlled, and managed the steamship "Linfield Victory," and used it for transportation of freight for hire by water in interstate commerce and coastwise trade.

VII.

That on or about the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the Defendant Pacific-Atlantic Steamship Co. aboard said steamship as an able-bodied seaman with deck maintenance duties.

VIII.

That on or about said 24th day of April, 1951, the said steamship "Linfield Victory" was in the port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of and performance of his duties, under the direction of an agent of the Defendant Pacific-Atlantic Steamship Co., and in furtherance of the interest of said Defendant, with other employees of said Defendant; that said deceased while so engaged was directed by said agent of said Defendant to work in and about that

portion of said steamship designated as the No. 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to said No. 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship, and located directly adjacent to an open ventilating shaft; that in the course of said duties and employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilating shaft, causing him to sustain during his lifetime devastating and permanent personal injuries and conscious pain and suffering; that said injuries were directly caused by reason of the negligence of said Defendant in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work.

IX.

That Defendant Pacific-Atlantic Steamship Co. and its employees were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall, to wit, on the 30th day of April, 1951, after said steamship had proceeded to and was in the port of Philadelphia, State of Pennsylvania.

X.

That as a result of the premises, the deceased Nathanael Patrick Hutchison sustained damages in the sum of Twenty-five Thousand Dollars (\$25,000.00).

Second Cause of Action**I.**

Plaintiff refers to Paragraphs I, II, III, IV, V, VI, VII, VIII, and IX of her first cause of action and by reference makes them a part hereof.

II.

That as a result of said injuries, said Nathanael Patrick Hutchison died at some time between the date of said fall, to wit, the 24th day of April, 1951, and the date on which said deceased was discovered at the bottom of said ventilating shaft, to wit, the 30th day of April, 1951, the exact date and time of the death being to the Plaintiff unknown; that said Nathanael Patrick Hutchison left surviving him as a dependent the Plaintiff herein, Emma Hutchison, who has, as a direct consequence of said death, suffered damages in the sum of Ninety Thousand Dollars (\$90,000.00).

Wherefore, Plaintiff demands judgment against Defendant Pacific-Atlantic Steamship Co. on the first cause of action in the sum of Twenty-five Thousand Dollars (\$25,000.00) and on the second cause of action in the sum of Ninety Thousand Dol-

lars (\$90,000.00), together with the costs and disbursements of this action.

Dated: September 30, 1952.

SIMPSON & WISE,
/s/ By RAYMOND C. SIMPSON,
Attorneys for Plaintiff

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 2, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS, MOTION FOR MORE
DEFINITE STATEMENT AND MOTION
TO STRIKE

* * * * *

13. Defendant Pacific-Atlantic Steamship Company, a corporation, moves for an order striking all of Paragraph IX of the first cause of action and Paragraph IX as incorporated by reference thereto in the second cause of action, upon the following grounds:

(a) The language contained in said paragraph constitutes nothing but conclusions and opinions of the pleader.

(b) There is no duty imposed upon the defendant by any statute to search for or discover the body of a deceased seaman or a living seaman in an injured condition.

(c) The language contained in Paragraph IX is immaterial.

(d) The language contained in said Paragraph IX is impertinent to any legal duty imposed upon the employer of a seaman pursuant to those portions of the Federal Employers' Liability Act, adopted by reference thereto in the Jones Act, modifying or extending the common law right or remedy available to railway employees.

(e) Said Paragraph IX is immaterial and impertinent to any of the factual bases of liability by reason of the death of a seaman pursuant to those portions of the Federal Employers' Liability Act which create or confer a right of action for the death of a railway employee.

Wherefore, defendant Pacific-Atlantic Steamship Company prays that said motions and each thereof be granted.

/s/ LASHER B. GALLAGHER,
Attorney for Defendant Pacific-Atlantic Steamship
Company, a corp.

* * * * *

[Endorsed]: Filed October 10, 1952.

[Title of District Court and Cause.]

MINUTES OF THE COURT: JURY IM-
PANELMENT AND TRIAL

Date: Oct. 10, 1952, at Los Angeles, Calif.

Present: The Honorable Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: Fred Sherry; Counsel for Libelant: R. C. Simpson; Counsel for Respondent: L. B. Gallagher.

Proceedings: For jury trial. At 9:15 a.m. court convenes in Chambers. Attorney for defendant moves to dismiss, for more definite statement, and to strike. Court denies said motions and allows defendant to 5 p.m., Nov. 13, 1952, to file answer to amended complaint.

At 10:15 a.m. court convenes in open court and all parties being present, Court orders trial proceed, and that a jury be impaneled.

The following jurors, duly impaneled, are sworn to try this cause.

1. Edward B. Patterson; 2. Clyde L. Smith; 3. Eugene T. Olsen; 4. Eugene P. Valentine; 5. Charlotte K. Brown; 6. John H. Daly; 7. George C. Malloy; 8. Joy L. Ziegler; 9. Agnes C. Reinwald; 10. Cornelia H. Leete; 11. Roy Frankson; 12. Alfred P. Brown. Alternate Juror: Alfred G. Smith.

It Is Ordered that cause is continued to Oct. 14, 1952, 11 a.m., for further jury trial.

EDMUND L. SMITH,
Clerk

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT

Defendant Pacific-Atlantic Steamship Company, a corporation, answers the first amended complaint as follows:

First Cause of Action

I.

Defendant denies the averments and each thereof in Paragraph I.

II.

Answering the averments in Paragraph II defendant specifically denies that Nathanael Patrick Hutchison died on or about the 30th day of April, 1951.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments and each thereof in Paragraph II.

* * * * *

IV.

Defendant denies the averments and each thereof in Paragraph IV.

* * * * *

VII.

Answering the averments in Paragraph VII defendant admits that from 8 a.m. until approximately 12:30 p.m. on the 24th day of April, 1951, Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Company aboard the SS "Linfield Victory" as an

able bodied seaman but denies that during said period of time said Nathanael Patrick Hutchison was charged with or performing deck maintenance duties or any deck maintenance duty.

Except as hereinabove specifically admitted or alleged defendant denies the averments and each thereof in Paragraph VII.

VIII.

Answering the averments in Paragraph VIII defendant admits that on the 24th day of April, 1951, the steamship "Linfield Victory" was in the port of Baltimore, State of Maryland and that from 8 a.m. of said day until ten minutes to 12 a.m. on said date Nathanael Patrick Hutchison was engaged in the course and performance of his duties and in furtherance of the interest of said defendant with other employees of said defendant.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments or any thereof in said Paragraph VIII excepting the averments "that said injuries were directly caused by reason of the negligence of the defendant in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a safe place to work" and with reference to said averments the defendant specifically denies that any injury was directly or at all caused by negligence on the part of said defendant or by reason of negligence on the part of said defendant either as averred or otherwise or at all and spe-

cifically denies that the law imposed upon said defendant any duty to supply Nathanael Patrick Hutchison with "safety appliances" or any safety appliance or to provide Nathanael Patrick Hutchison with a safe place to work.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that "deceased fell into said ventilator shaft".

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment "thereby precipitating him to the bottom of said ventilator shaft".

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment "causing him to sustain during his lifetime devastating and permanent personal injuries and conscious pain and suffering."

IX.

Defendant denies the averments and each thereof in Paragraph IX and denies that there was any legal duty imposed upon the defendant to search for or discover a deceased Nathanael Patrick Hutchison.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment or recital that Nathanael Patrick Hutchison sustained any injury by reason of a fall.

Second Cause of Action

I.

Defendant incorporates herein by reference thereto its answer to Paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the first cause of action and by such reference makes the same a part hereof.

With specific reference to Paragraph VIII of the first cause of action, incorporated by reference thereto in Paragraph I of the second cause of action, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in said Paragraph VIII that "deceased fell into said open ventilator shaft"; that he was thereby precipitated to the bottom of said ventilating shaft or that any fall caused Nathanael Patrick Hutchison to sustain during his lifetime any injury or any pain or any suffering.

II.

Answering the averments in Paragraph II of said second cause of action defendant admits that Nathanael Patrick Hutchison is dead and that he was dead on the 30th day of April, 1951.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment in the form of a recital "the date of said fall."

Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments and each thereof in said Paragraph II of the second cause of action.

III.

Defendant specifically denies that plaintiff has been damaged in any sum whatsoever or at all.

* * * * *

As and for a Further, Separate and Special Defense, defendant avers that if Nathanael Patrick Hutchison fell into an open ventilator shaft or if he was thereby precipitated to the bottom of a ventilator shaft or if any such fall caused him to sustain personal injuries or if he suffered death by reason of any personal injury, then the said Nathanael Patrick Hutchison went into a part of the vessel where no duty called and where he had no duties to perform and the said Nathanael Patrick Hutchison so negligently and carelessly conducted himself that if he fell to the bottom of a ventilator shaft such fall was a proximate result of said negligence and carelessness on the part of said Nathanael Patrick Hutchison.

Wherefore defendant prays that plaintiff take nothing by said first amended complaint and that defendant have judgment for its costs incurred and to be incurred herein.

/s/ LASHER B. GALLAGHER,
Attorney for Defendant Pacific-Atlantic Steamship
Company, a corporation

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 13, 1952.

[Title of District Court and Cause.]

VERDICT

First Cause of Action (Personal Injuries)

Upon the First Cause of Action, we the jury find in favor of Defendants and against Plaintiff and we find the damages sustained by Nathanael Patrick Hutchison to be the sum of \$ Nothing.

Second Cause of Action (The Suit for Damages for Death)

Upon the Second Cause of Action, we the jury do find in favor of Defendants and against Plaintiff.

* * * * *

The foregoing constitute the verdict of the jury.

Dated: This 29 day of October, 1952.

/s/ Illegible

Foreman of the Jury.

[Endorsed]: Filed October 29, 1952.

[Title of District Court and Cause.]

JUDGMENT ON VERDICT

This cause having been regularly tried by jury duly impanelled and sworn; R. C. Simpson, Esq., appearing as counsel for the plaintiff and Lasher B. Gallagher, Esq., appearing as counsel for the

defendant; and the trial having proceeded on October 16, 17, 21, 22, 23, 24, 28 and 29, 1952; and the jury having returned on October 29, 1952 its verdict as to the First Cause of Action (Personal Injuries) and the Second Cause of Action (Damages for Death) to the complaint as follows:

(1) As to the First Cause of Action the jury finds in favor of the Defendants and against the Plaintiff;

(2) As to the Second Cause of Action the jury finds in favor of the Defendants and against the Plaintiff;

Now, Therefore, in accordance with the aforesaid premises and said verdicts, and pursuant to law,

It Is Ordered, Adjudged and Decreed that judgment be entered in favor of the defendant and against the plaintiff.

Costs taxed at \$483.44.

Witness, the Honorable Ernest A. Tolin, United States District Judge, Southern District of California, this 29th day of October, 1952.

EDMUND L. SMITH,
Clerk

/s/ By WM. A. WHITE,
Deputy Clerk

[Endorsed]: Filed October 29, 1952. Judgment Docketed and Entered October 31, 1952.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS UNDER
RULE 36

To Pacific-Atlantic Steamship Co., Defendant:

Plaintiff Emma Hutchison requests defendant, within 15 days after service of this request, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following statements is true:

(a) On April 24, 1951, there were no artificial lighting fixtures of any kind whatsoever installed inside the masthouse enclosing the ventilator shaft on the S.S. Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found.

(b) On April 24, 1951, you provided no artificial lighting appliances or devices, other than fixtures, of any kind whatsoever, in the masthouse enclosing the ventilator shaft on the S.S. Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found.

(c) On April 24, 1951, there were no permanent electrical installations of any kind whatsoever, which could be used for furnishing artificial illumination, in the masthouse enclosing the ventilator shaft on the S.S. Linfield Victory in which,

on April 30, 1951, the body of Nathanael Patrick Hutchison was found.

(d) On April 24, 1951, you provided no temporary electrical installations of any kind whatsoever which could be used for furnishing artificial illumination in the masthouse enclosing the ventilator shaft on the S.S. Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found.

(e) On April 24, 1951, you provided no means of artificially illuminating the masthouse enclosing the ventilator shaft on the S.S. Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found.

(f) At all times during the month of April, 1951, pursuant to Bareboat Charter Agreement (Contract No. MA14) with the United States of America, you were operating, controlling, and managing the steamship, S.S. Linfield Victory.

(g) At all times between April 1, 1951, and October 13, 1952, you were doing business within the State of California and within the jurisdiction of the District Court of the United States for the Southern District of California.

SIMPSON, WISE & KILPATRICK,
/s/ By RAYMOND C. SIMPSON,
Attorneys for Plaintiff

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 11, 1955.

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSIONS
UNDER RULE 36

Subject to all pertinent objections to the admissibility thereof which may be interposed at the time of trial, defendant Pacific-Atlantic Steamship Co., a corporation, answers plaintiff's request for admissions as follows:

1.(a) The defendant can not truthfully admit or deny the foregoing statement for the reason that it is not in possession of any statement or information from any person who was inside of the masthouse enclosing said ventilator shaft with respect to whether there was or was not any portable artificial lighting fixture installed inside said masthouse enclosure on April 24, 1951. So far as defendant Pacific-Atlantic Steamship Co., a corporation, has been informed, the only persons who in all probability were in said masthouse enclosure on April 24, 1951, in addition to Nathanael Patrick Hutchison, were Ernest Kalnin, Bos'n, Richard L. Prouty, Andreas Amundsen, and Torale K. Eriksen, all unlicensed members of the deck department. On May 1, 1951, Lt. Comdr. W. R. Sayer, United States Coast Guard, conducted an investigation at Philadelphia, Pennsylvania, and took statements, under oath, from Ernest Kalnin, Andreas Amundsen, Torale K. Eriksen, and Richard L. Prouty. None of said men was asked any question with reference to the subject matter of request for admissions

1(a). None of said men is now in the employ of defendant Pacific-Atlantic Steamship Co., a corporation, and in order to answer this request for an admission it would be necessary for defendant to interview each of these men with reference to the subject matter of request 1(a). Defendant has no information or belief upon the subject sufficient to enable it to admit or deny purported statement 1(a), and placing its denial thereof upon said ground, denies said statement generally and specifically.

1.(b) Defendant can not truthfully admit or deny the purported statement contained in 1(b) for the reason that there were portable lighting appliances and devices, other than fixtures, which on April 24, 1951, could have been stored in the masthouse enclosing the ventilator shaft on the steamer "Linfield Victory" in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found, or such appliances or devices could have been stored, if not being stored in said portion of the masthouse, in other portions of the masthouse immediately adjacent to that part of the masthouse enclosing said ventilator shaft. The only persons who could answer this question categorically are those persons who were actually in said portion of the masthouse enclosing said ventilator shaft on April 24, 1951, and none of said persons has informed defendant with respect to said subject. It is also possible that said portable lighting appliances or devices could have been laying on the deck

immediately adjacent to the afterbulkhead of masthouse No. 2.

1.(c) On April 24, 1951, there were no permanent electrical installations inside that portion of the masthouse enclosing the ventilator shaft on the steamer "Linfield Victory" in which the body of Nathanael Patrick Hutchison was found on April 30, 1951. There was a permanent electrical installation consisting of electric current outlets permanently installed on the afterbulkhead of said masthouse and within 55 inches of the door leading into that portion of the masthouse enclosing said ventilator shaft, and the said permanent electrical installation could have been used on April 24, 1951, if necessary, for furnishing artificial illumination in the masthouse enclosing the ventilator shaft on the steamer "Linfield Victory" in which the body of Nathanael Hutchison was found on April 30, 1951.

1.(d) Defendant, by reference thereto, incorporates herein its answers to purported statements 1(a), 1(b), and 1(c) with the same effect as though said answers were, and each thereof was, repeated in detail herein.

1.(e) The steamer "Linfield Victory" was equipped with portable artificial lighting appliances and devices consisting of cords with reflector hoods and electric light bulbs on one end and suitable means at the other end for inserting or screwing such other end into an electric current outlet located on the afterbulkhead of masthouse No. 2 at a point approximately 55 inches from the door

leading into that portion of masthouse No. 2 in which an escape shaft and a ventilator shaft were located. Such portable artificial lighting appliances or devices, other than fixtures, were customarily stored in each of the masthouses of the vessel. Whether such appliances or devices were, on April 24, 1951, in that part of the masthouse No. 2 enclosing the ventilator shaft in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found is not known to affiant. So far as affiant has been able to ascertain no investigation has disclosed whether or not any such portable artificial lighting appliances or devices were actually within the portside of masthouse No. 2 on April 24, 1951.

1.(f) Defendant admits that during the month of April, 1951, pursuant to Bareboat Charter Agreement (Contract No. MA14) with the United States of America, it was operating and managing the steamer or steamship "Linfield Victory", in its intercoastal service. Defendant denies that it had unlimited control over the steamer "Linfield Victory" and in this respect alleges that Clause 11, Part 2, of said Bareboat Charter Agreement provided as follows: "Structural changes. The charterer shall make no structural changes in the vessel and shall make no changes in the machinery, boilers, appurtenances or spare parts thereof without in each instance first securing the written approval of the owner." The owner of said vessel was, at all times mentioned herein, the United States of America, Department of Commerce, Maritime Administration.

1.(g) Defendant admits that at all times between April 1, 1951, and October 13, 1952, it was doing business within the Southern District of California, Central Division.

/s/ LASHER B. GALLAGHER,
Attorney for the Defendant, Pacific-Atlantic
Steamship Co., a corporation

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed August 22, 1955.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED INSTRUCTIONS

Defendant's Proposed Instruction No. 1

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

B.A.J.I. No. 1.

Defendant's Proposed Instruction No. 2

If in these instructions, any rule, direction or

idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others.

B.A.J.I. No. 2.

Defendant's Proposed Instruction No. 3

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

B.A.J.I. No. 3.

Defendant's Proposed Instruction No. 4

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action.

B.A.J.I. No. 4.

Defendant's Proposed Instruction No. 5

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; what facts are, or are not, established; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

B.A.J.I. No. 5.

Defendant's Proposed Instruction No. 6

On the other hand, your own authority to judge the evidence and to determine the facts in the case has this limitation: It is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

B.A.J.I. No. 6-A.

Defendant's Proposed Instruction No. 7

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors,

and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

B.A.J.I. No. 7.

Defendant's Proposed Instruction No. 8

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the court would remind you that in your deliberations in the jury room

there can be no triumph excepting the ascertainment and declaration of the truth.

B.A.J.I. No. 8.

Defendant's Proposed Instruction No. 9

In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the "burden of proof" as to that issue is on that party. This means that if there is no preponderance of evidence on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue.

B.A.J.I. No. 21.

Defendant's Proposed Instruction No. 10

You shall not consider as evidence any statements of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you.

B.A.J.I. No. 23.

Defendant's Proposed Instruction No. 11

The plaintiff Emma Hutchison is the administratrix of the estate of Nathanael Patrick Hutchison, deceased. She is also the surviving widow of Nathanael Patrick Hutchison. She has filed a complaint pursuant to which she claims that she is entitled to recover damages from the defendant Pacific-Atlantic Steamship Company. This complaint contains two separate and distinct claims. In the first of these claims she contends that Nathanael Patrick Hutchison sustained conscious pain and suffering between the time he was injured and the time of his death. In the second claim set forth in the complaint she contends that she, as the surviving widow of Nathanael Patrick Hutchison, has suffered damage as a direct consequence of his death. The fact that she has filed the complaint does not carry with it any implication that she is actually entitled to recover any damage by reason of either of said claims.

The plaintiff, in her complaint, avers that Nathanael Patrick Hutchison suffered personal injuries in the course of his employment and that said injuries were directly caused by reason of negligence of the defendant in that, as she contends, it failed and neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about a ventilator shaft to provide a reasonably safe place in which to work and that as a proximate result thereof the said Nathanael Patrick Hutchison fell into the ventilator shaft thereby causing him to sustain during his lifetime personal injuries and conscious pain and suffering and that as a further proximate result thereof the said Nathanael Patrick Hutchison died.

Plaintiff avers in Paragraph VII of her complaint that on or about the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Co. aboard the SS "Linfield Victory" as an able-bodied seaman with deck maintenance duties. She also alleges in Paragraph VIII of her complaint that on or about the 24th day of April, 1951, the steamship "Linfield Victory" was in the Port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of and performance of his duties, under the direction of an agent of the defendant Pacific-Atlantic Steamship Co., and in furtherance of the interest of said defendant, with other employees of said defendant; that said deceased while so engaged was directed by said agent

of said defendant to work in and about that portion of said steamship designated as the No. 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to No. 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship; and located directly adjacent to an open ventilating shaft; and that in the course of said duties and employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilating shaft.

With reference to the averments in Paragraph VII of the complaint, the defendant in its answer admits that during a part of said 24th day of April, 1951, Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Company aboard the SS "Linfield Victory" as an able-bodied seaman but denies that during said period of time said Nathanael Patrick Hutchison was charged with or performing deck maintenance duties or any deck maintenance duty. The defendant also, in answering the averments of Paragraph VIII of plaintiff's complaint, denies that at any time after 12:30 p.m. on the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant as an able-bodied seaman or in any other capacity. In other words, the defendant denies that the relationship of employer and employee existed between it and Nathanael Patrick Hutchison at any

time after approximately 12:30 p.m. on the 24th day of April, 1951.

In its answer to the averments in Paragraph VIII of the plaintiff's complaint, the defendant admits that on the 24th day of April, 1951, the steamship "Linfield Victory" was in the Port of Baltimore, State of Maryland, and that from 8:00 a.m. of said day until 10 minutes of 12:00 a.m. on said date, Nathanael Patrick Hutchison was engaged in the course and performance of his duties and in furtherance of the interest of said defendant, with other employees of said defendant. Every other averment set forth in Paragraph VIII of plaintiff's complaint is denied in the answer of the defendant.

A statute enacted by the Congress of the **United States** provides that in case of the death of any seaman as a result of personal injury suffered in the course of his employment, the personal representative of such seaman may maintain an action for damages and that the employer of such deceased seaman shall be liable in damages to his personal representative for the benefit of the surviving widow for such death resulting in whole or in part by reason of any insufficiency, due to the employer's negligence, in its appliances. Said statute enacted by the Congress also provides that any seaman who shall suffer personal injury in the course of his employment may maintain an action for damages at law in the event such injury results in whole or in part by reason of any insufficiency, due to the employer's negligence, in its appliances and

that such right of action shall survive to his personal representative, for the benefit of the surviving widow of such seaman.

The material issues of fact with respect to the question of liability submitted to you for decision are the following:

1. Did Nathanael Patrick Hutchison suffer personal injury in the course of his employment?

2. Did Nathanael Patrick Hutchison suffer such personal injury as a proximate result of a negligent failure or neglect on the part of the defendant to supply him with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work?

The burden of proof with respect to the averments of the complaint which are denied in the answer of the defendant rests exclusively and continuously upon the plaintiff and does not at any time shift to the defendant. In other words, no burden rests upon the defendant to offer any evidence whatever for the purpose of disproving the averments set forth in plaintiff's complaint.

Defendant's Proposed Instruction No. 11-A

The plaintiff Emma Hutchison is the administratrix of the estate of Nathanael Patrick Hutchison, deceased. She is also the surviving widow of Nathanael Patrick Hutchison. She has filed a complaint pursuant to which she claims that she is entitled to recover damages from the defendant Pacific-Atlantic Steamship Company. In one of the claims averred in the complaint, she contends that Nathanael Patrick Hutchison sustained conscious pain

and suffering between the time he was injured and the time of his death. In another claim set forth in the complaint she contends that she, as the surviving widow of Nathanael Patrick Hutchison, has suffered damage as a direct consequence of his death. The fact that she has filed the complaint does not carry with it any implication that she is actually entitled to recover any damage by reason of either of said claims.

The plaintiff, in her complaint, avers in paragraph VIII that Nathanael Patrick Hutchison suffered personal injuries in the course of his employment and that said injuries were directly caused by reason of negligence of the defendant in that, as she contends, it failed and neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about a ventilator shaft to provide a reasonably safe place in which to work and that as a proximate result thereof the said Nathanael Patrick Hutchison fell into the ventilator shaft thereby causing him to sustain during his lifetime personal injuries and conscious pain and suffering and that as a further proximate result of said injuries the said Nathanael Patrick Hutchison died.

Plaintiff avers in Paragraph VII of her complaint that on or about the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Co. aboard the SS "Linfield Victory" as an able-bodied seaman with deck maintenance duties. She also alleges in Paragraph VIII of her

complaint that on or about the 24th day of April, 1951, the steamship "Linfield Victory" was in the Port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of his employment; that said deceased while so engaged was directed by said agent of said defendant to work in and about that portion of said steamship designated as the No. 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to No. 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship; and that said ladder was located directly adjacent to an open ventilating shaft; and that in the course of his employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilating shaft.

With reference to the averments in Paragraph VII of the complaint, the defendant in its answer admits that during a part of said 24th day of April, 1951, Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Company aboard the SS "Linfield Victory" as an able-bodied seaman, but denies that during said period of time said Nathanael Patrick Hutchison was charged with or performing deck maintenance duties or any deck maintenance duty. The defendant also, in answering the averments of Paragraph VIII of plaintiff's complaint, denies

that at any time after 12:30 p.m. on the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant. In other words, the defendant denies that the relationship of employer and employee existed between it and Nathanael Patrick Hutchison at any time after approximately 12:30 p.m. on the 24th day of April, 1951.

In its answer to the averments in Paragraph VIII of the plaintiff's complaint, the defendant admits that on the 24th day of April, 1951, the steamship "Linfield Victory" was in the Port of Baltimore, State of Maryland, and that from 8:00 a.m. of said day until 10 minutes of 12:00 a.m. on said date, Nathanael Patrick Hutchison was engaged in the course and performance of his duties and in furtherance of the interest of said defendant, with other employees of said defendant. Every other averment set forth in Paragraph VIII of plaintiff's complaint hereinabove referred to is denied in the answer of the defendant.

The issues of fact with respect to the foregoing averments of the complaint which have been denied in defendant's answer submitted to you for decision, are the following:

1. Did Nathanael Patrick Hutchison suffer personal injury in the course of his employment?

2. Did Nathanael Patrick Hutchison suffer such personal injury as a proximate result of a negligent failure or neglect on the part of the defendant to supply him with sufficient safety appliances in and

about the ventilator shaft to provide a reasonably safe place in which to work?

The burden of proof with respect to the said averments of the complaint which are denied in the answer of the defendant rests exclusively and continuously upon the plaintiff and does not at any time shift to the defendant. In other words, no burden rests upon the defendant to offer any evidence whatever for the purpose of disproving any of the averments set forth in plaintiff's complaint and which are denied in the defendant's answer.

Defendant's Proposed Instruction No. 12

Pursuant to certain so-called workmen's compensation statutes an employer becomes liable for the payment of compensation benefits to an employee injured in the course of his employment or to his widow in the event of his death by reason of injuries suffered in the course of his employment, regardless of whether the injury or death is or is not proximately caused or contributed to by negligence on the part of the employer. The law pursuant to which this case is governed is not a workmen's compensation statute. The mere fact that Nathanael Patrick Hutchison may have suffered personal injuries resulting in his death is not sufficient to entitle the plaintiff to recover any damages whatever even though Nathanael Patrick Hutchison may have been engaged in the course of his employment at the time he suffered such personal injury. There is no liability whatever on the part of the defendant in this case in the absence

of proof of a negligent failure on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place in which to work and proof by a preponderance of substantial evidence that such, if any, failure on the part of the defendant proximately caused or proximately contributed to the personal injuries suffered by Nathanael Patrick Hutchison.

Defendant's Proposed Instruction No. 13.

In your deliberations you are not permitted to determine what issues of fact are raised by the pleadings. Whether an issue of fact is or is not raised by the pleadings is a question of law and is within the sole province of the court.

Defendant's Proposed Instruction No. 14

The court will call to your attention certain averments set forth by the plaintiff in her complaint. In reading to you these allegations you will not understand or infer that the court is intimating that these averments of the complaint constitute anything more than claims asserted by the plaintiff. The averments of the complaint do not constitute evidence and may not be considered by you as evidence. Plaintiff alleges that on or about the 24th day of April, 1951, the "Linfield Victory" was in the Port of Baltimore, State of Maryland; that on said day the deceased Nathanael Patrick Hutchison was engaged in the course and performance of his duties, under the direction of an agent

of the defendant Pacific-Atlantic Steamship Company, and in furtherance of the interest of said defendant with other employees of said defendant; that said deceased while so engaged was directed by an agent of said defendant to work in and about that portion of said steamship designated as the number 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to said number 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship; and that said ladder was located directly adjacent to an open ventilating shaft; that in the course of said duties and employment, deceased fell into said ventilator shaft, causing him to sustain personal injuries; and that said personal injuries caused Nathanael Patrick Hutchison to suffer during his lifetime conscious pain and suffering and that as a result of said personal injuries the said Nathanael Patrick Hutchison died; that said injuries were directly caused by reason of negligence on the part of defendant in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work.

The defendant in its answer denies that Nathanael Patrick Hutchison was engaged in the course or performance of his duties or under the direction of an agent of the defendant or in furtherance of the interest of said defendant at the time he suf-

ferred the personal injury as a result of which he died. Defendant in its answer denies that the ventilating shaft was an open shaft and denies that the deceased fell into said ventilator shaft in the course of any duty or employment; and also denies that there was any failure on the part of the defendant to supply said deceased with sufficient safety appliances in and about said ventilator shaft or that, in this respect, there was any failure to provide a reasonably safe place in which to work.

Each averment of the complaint which is denied in the answer raises an issue of material fact. The sole and exclusive burden of proving each of these issues of fact rests and remains throughout the trial upon the plaintiff.

Defendant's Proposed Instruction No. 14-A

The court will call to your attention certain averments set forth by the plaintiff in her complaint. In reading to you these allegations you will not understand or infer that the court is intimating that these averments of the complaint constitute anything more than claims asserted by the plaintiff. The averments of the complaint do not constitute evidence and may not be considered by you as evidence. Plaintiff alleges that on or about the 24th day of April, 1951, the "Linfield Victory" was in the Port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course and performance of his duties; that said deceased while so engaged was directed by an agent of said defendant to work

in and about that portion of said steamship designated as the number 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to said number 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship; and that said ladder was located directly adjacent to an open ventilating shaft; that in the course of said duties and employment, deceased fell into said ventilator shaft, thereby precipitating him to the bottom of said ventilating shaft, causing him to sustain personal injuries; and that said personal injuries caused Nathanael Patrick Hutchison to suffer during his lifetime conscious pain and suffering and that as a result of said personal injuries the said Nathanael Patrick Hutchison died; that said injuries were directly caused by reason of negligence on the part of defendant in that as plaintiff contends, it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work.

The defendant in its answer denies that Nathanael Patrick Hutchison was engaged in the course of his employment at the time he suffered the personal injury as a result of which he died. Defendant in its answer denies that the ventilating shaft was an open shaft and denies that the deceased fell into said ventilator shaft in the course of his employment; and also denies that there was any

failure on the part of the defendant to supply said deceased with sufficient safety appliances in and about said ventilator shaft or that, in this respect, there was any failure to provide a reasonably safe place in which to work.

Each averment of the complaint which is denied in the answer raises an issue of material fact. The sole and exclusive burden of proving each of these issues of fact rests and remains throughout the trial upon the plaintiff.

Defendant's Proposed Instruction No. 15

Your specific attention is directed to the proposition that the plaintiff does not aver in her complaint that any appliance in or about the ventilator shaft in masthouse No. 2 was defective. The only claim she makes in this respect is that the defendant did not supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. In deciding whether the defendant is or is not liable in damages you are instructed that with respect to this particular element of plaintiff's claim you are restricted to determining whether there were or were not sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. If you find from all of the evidence that the defendant did supply a safety appliance about the ventilator shaft in masthead No. 2 and that said safety appliance was in itself sufficient to provide a reasonably safe place in which to work, it will be your duty to return a verdict

in favor of the defendant with reference to each of plaintiff's claims.

Defendant's Proposed Instruction No. 15-A

Your specific attention is directed to the proposition that the plaintiff does not aver in her complaint that any appliance in or about the ventilator shaft in masthouse No. 2 was defective. The only claim she makes in this respect is that the defendant did not supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. In deciding whether the defendant is or is not liable in damages, you are instructed that with respect to this particular element of plaintiff's claim you are restricted to determining whether there were or were not sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. If you find from all of the evidence that the defendant did supply a safety appliance about the ventilator shaft in masthouse No. 2 and that said safety appliance was in itself sufficient to provide a reasonably safe place in which to work, it will be your duty to find defendant was not negligent in this respect.

Defendant's Proposed Instruction No. 16

There is no averment set forth in plaintiff's complaint that the defendant negligently or otherwise failed or neglected to supply the deceased with a safety appliance about the ventilator shaft in masthouse No. 2. The averment or claim of the plaintiff, denied by the defendant, is that the defendant

negligently failed and neglected to supply the deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work. Therefore the claim of the plaintiff in this respect is that the pipe railings surrounding the opening in the masthouse deck at the top of the ventilator shaft were not in themselves a reasonably sufficient safety appliance in and about said ventilator shaft to provide a reasonably safe place to work. If you find from all of the evidence that the pipe railings surrounding opening at the top of the ventilator shaft was a safety appliance and that it, without anything more, was a reasonably adequate safety appliance and provided a seaman whose duties might require him to be in the masthouse in the performance of his duties with a condition of reasonable safety in the event such seaman was exercising ordinary care for his own safety and preservation, then you are instructed that no duty was imposed by law upon the defendant to provide any other, different or additional safety appliance in and about the said ventilator shaft.

Defendant's Proposed Instruction No. 16-A

There is no averment set forth in plaintiff's complaint that the defendant negligently or otherwise failed or neglected to supply the deceased with a safety appliance about the ventilator shaft in masthouse No. 2. The averment or claim of the plaintiff in this respect, denied by the defendant, is that the defendant negligently failed and neglected to

supply the deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work. Therefore the claim of the plaintiff in this respect is that the pipe railings surrounding the opening in the masthouse deck at the top of the ventilator shaft were not in themselves a reasonably sufficient safety appliance in and about said ventilator shaft to provide a reasonably safe place to work. If you find from all of the evidence that the pipe railings surrounding opening at the top of the ventilator shaft was a safety appliance and that it, without anything more, was a reasonably adequate safety appliance and provided a seaman whose duties might require him to be in the masthouse in the performance of this duties with a condition of reasonable safety in the event such seaman was exercising ordinary care for his own safety and preservation, then you are instructed that no duty was imposed by law upon the defendant to provide any other, different or additional safety appliance in and about the said ventilator shaft.

Defendant's Proposed Instruction No. 17

In so far as the second claim of plaintiff is concerned, the one in which she seeks damages by reason of the death of Nathanael Patrick Hutchison, you are instructed that that particular claim is predicated solely and exclusively upon a statute which provides, in so far as it may be applicable to the averments set forth in plaintiff's complaint, that the employer of a seaman shall be liable in

damages in the event his death is proximately caused, or proximately contributed to, by reason of any insufficiency, due to the ship operator's negligence, in its safety appliances in and about the ventilator shaft located in masthouse No. 2. Thus, in order to prevail on the second claim, the plaintiff must prove by a preponderance of substantial evidence that there was actually an insufficiency in the defendant's safety appliances in and about said ventilator shaft; that such, if any, insufficiency was due in whole or in part to negligence on the part of the defendant and that the death of Nathanael Patrick Hutchison was proximately caused or proximately contributed to by such, if any, negligence.

Defendant's Proposed Instruction No. 18

The law imposed upon the defendant the duty of exercising ordinary care to supply reasonably adequate safety appliances in and about the ventilator shaft located in masthouse No. 2 to provide a reasonably safe place to work, but this does not require the defendant to provide safety appliances which would have made the ventilator shaft reasonably safe for the use by or protection of any seaman excepting one who in his reasonably necessary use of the masthouse in and about the ventilator shaft is exercising ordinary care for his own safety and preservation. There is no duty imposed by law upon a ship operator to provide sufficient safety appliances which might be necessary for the purpose of preserving the bodily safety or life of a seaman who in his use thereof does anything which

an ordinarily prudent seaman would not do or fails to do anything which an ordinarily prudent seaman would have done under the same or similar circumstances.

Defendant's Proposed Instruction No. 19

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. While the foregoing definition of negligence is a general definition, you are instructed that in applying this definition to the question of liability, if any, on the part of the defendant you are restricted to the evidence, if any, with respect to the specific claim of negligence which the plaintiff avers in her complaint.

Adapted from B.A.J.I. No. 101.

Defendant's Proposed Instruction No. 19-A

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. While the foregoing definition of negligence is a general definition, you are instructed that in applying this definition to the question of liability, if any, on the part of the defendant, you are restricted to the evidence, if any, with respect to the specific

averments of alleged negligent omissions which the plaintiff avers in her complaint.

Adapted from B.A.J.I. No. 101.

Defendant's Proposed Instruction No. 20

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

B.A.J.I. No. 101-B.

Defendant's Proposed Instruction No. 21

Ordinary care or reasonable care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others.

B.A.J.I. No. 102.

Defendant's Proposed Instruction No. 22

Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

B.A.J.I. No. 103.

Defendant's Proposed Instruction No. 23

The proximate cause of an injury or death is a negligent act or omission which, in natural and

continuous sequence, unbroken by any efficient intervening cause, produces the injury or death, and without which the result would not have occurred. In this connection you are reminded of the proposition that the plaintiff does not aver in her complaint that the defendant committed any negligent act.

Adapted from B.A.J.I. No. 104.

Defendant's Proposed Instruction No. 24

You are instructed that in the absence of evidence, direct or indirect, to the contrary it is a presumption of law that the defendant in the pending case did not fail, negligently or otherwise, to supply reasonably sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. In the absence of evidence, direct or indirect, to the contrary your finding on this issue of fact must be in favor of the defendant. If you find in favor of the defendant on this particular issue of fact your verdict must be in favor of the defendant with respect to both of the claims asserted by her in her complaint.

Defendant's Proposed Instruction No. 25

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively established the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively

establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

You are not entitled to indulge in any presumption excepting those, if any, which the court in these instructions shall state is a deduction which the law expressly directs to be made from particular facts.

Adapted from B.A.J.I. No. 22.

Defendant's Proposed Instruction No. 26

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a wit-

ness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

B.A.J.I. No. 33.

Defendant's Proposed Instruction No. 27

In the present action certain testimony has been read to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have confronted you on the witness stand.

B.A.J.I. No. 31.

Defendant's Proposed Instruction No. 28

One of the essential elements with reference to which the sole and exclusive burden of proof by a preponderance of evidence rests upon the plaintiff in this case is that at the precise time when Nathanael Patrick Hutchison suffered the personal injuries as a result of which he died, the relationship of employer and employee existed between

said Nathanael Patrick Hutchison and the defendant and that he was engaged in the course of his employment as such employee. In this connection, you are instructed that until a seaman signs shipping articles or makes some oral agreement with the Master of a vessel pursuant to which the seaman obligates himself to assume for some specific period of time the status of an employee and thus subject to the call of duty as a seaman, the seaman has a right to quit his job at any time he may see fit to do so.

Defendant's Proposed Instruction No. 29

An employee is engaged in the course of his employment whenever he is doing any reasonable thing which his contract of employment expressly or impliedly authorizes him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment.

Adapted from B.A.J.I. No. 301-D.

Defendant's Proposed Instruction No. 30

You are instructed that regardless of the existence or non-existence of sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place to work there is no liability on the part of the defendant in this case unless the plaintiff has proved by a preponderance of substantial evidence that Nathanael Patrick Hutchison actually suffered personal injury in the course of his employment. In this connection a sea-

man does not suffer a personal injury in the course of his employment unless at the time he suffered such personal injury he is actually engaged in the transaction of some business or the doing of some act which has been assigned to him by his employer or unless he is doing some reasonable thing which his contract of employment expressly or impliedly authorized him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment. Unless plaintiff has proved by a preponderance of substantial evidence that Nathanael Patrick Hutchison was actually in the course of his employment as a seaman at the very time he suffered personal injury, your verdict will be in favor of the defendant with respect to each of the claims set forth in plaintiff's complaint.

Defendant's Proposed Instruction No. 30-A

A seaman does not suffer a personal injury in the course of his employment unless at the time he suffered such personal injury he is actually engaged in the transaction of some business or the doing of some act which has been assigned to him by his employer or unless he is doing some reasonable thing which his contract of employment expressly or impliedly authorized him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment. Unless plaintiff has proved by a preponderance of evidence that Nathanael Patrick Hutchison was actually in the

course of his employment as a seaman at the very time he suffered the personal injuries proximately caused at the time he struck the bottom of the ventilator shaft, you must find that the defendant is not liable for any damages by reason of conscious pain and suffering on the part of Nathanael Patrick Hutchison or by reason of a failure, if any, of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work.

Defendant's Proposed Instruction No. 31

Your specific attention is directed to the proposition that there is no averment in the plaintiff's complaint charging that the personal injuries and death of Nathanael Patrick Hutchison were or that either thereof was proximately caused, in whole or in part, by reason of any negligence on the part of any of the officers of the vessel or on the part of any of the members of the crew of said vessel. The sole claim averred by the plaintiff in her complaint with respect to negligence on the part of defendant is her contention, which is denied by the defendant, that the defendant negligently failed and neglected to supply the deceased with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.

In order to justify the rendition of a verdict in favor of the plaintiff, she is required to prove by a preponderance of substantial evidence the following elements and each thereof:

1. That Nathanael Patrick Hutchison suffered personal injury.

2. That such personal injury was suffered in the course of his employment.

3. That there was failure on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.

4. That such failure was proximately caused, in whole or in part, by negligence on the part of the defendant.

5. That as a proximate result thereof the said Nathanael Patrick Hutchison suffered personal injuries and died as a result thereof.

Defendant's Proposed Instruction No. 31-A

You are instructed that there is no averment in the plaintiff's complaint charging that the personal injuries sustained at the time Nathanael Patrick Hutchison fell to the bottom of the ventilator shaft proximately caused, in whole or in part, by reason of any negligence on the part of any of the officers of the vessel or on the part of any of the members of the crew of said vessel. The sole claim averred by the plaintiff in her complaint with respect to the injuries sustained by her deceased husband at said time is her claim, which is denied by the defendant, that the defendant negligently failed and neglected to supply the deceased with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.

In order to justify or support a finding in favor

of the plaintiff upon the issue with respect to said claim, she is required to prove by a preponderance of substantial evidence, the following elements and each thereof:

1. That Nathanael Patrick Hutchison suffered personal injury.

2. That such personal injury was suffered in the course of his employment.

3. That there was a failure on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.

4. That such failure was proximately caused, in whole or in part, by negligence on the part of the defendant.

5. That as a proximate result thereof the said Nathanael Patrick Hutchison suffered personal injuries and died as a result thereof.

Defendant's Proposed Instruction No. 32

No omission may be considered negligent unless the danger of injury was reasonably foreseeable by the defendant, before the happening of the accident, in the exercise of that amount of care which would have been exercised by an ordinarily prudent employer under the same or similar circumstances. It is of the essence of actionable negligence that the party charged should, in the exercise of ordinary care and caution, have knowledge that the omission complained of was such an omission as might, within the realm of probability, cause some injury to a seaman exercising ordinary care for

his own safety. The circumstances necessary to be known before liability in consequence of an omission will be imposed must be such as would lead a reasonably prudent man to anticipate a reasonably possible danger of injury as a proximate result thereof.

Defendant's Proposed Instruction No. 32-A

No omission may be considered negligent unless the danger of injury was reasonably foreseeable by the defendant by the exercise of that amount of foresight which would have been exercised by an ordinarily prudent employer under the same or similar circumstances. It is of the essence of actionable negligence that a preponderance of the evidence must show that the party charged should, in the exercise of ordinary care and caution, have anticipated that the omission complained of was such an omission as might cause some injury to a seaman exercising ordinary care for his own safety. The circumstances necessary to be known before liability, by reason of an omission, will be imposed, must be such as would lead a reasonably prudent man to anticipate a reasonably possible danger of injury as a proximate result thereof.

Defendant's Proposed Instruction No. 33

With respect to safety appliances about the ventilator shaft in masthouse number 2, the law does not require absolute perfection nor was the defendant required to furnish appliances having the highest known degree of safety. It is sufficient if a safety appliance be such as is reasonably fit for its

purpose and reasonably adequate for the purpose of preventing accidental injury to an employee who is exercising ordinary care for his own safety.

Defendant's Proposed Instruction No. 34

The law does not set up an unreasonable standard of conduct for an employer. Therefore, an employer is not an insurer of the safety of its employees. It is not the absolute duty of an employer to furnish a safe place to work. The only obligation is that the employer exercise reasonable care to provide a reasonably safe place in which to work.

Defendant's Proposed Instruction No. 35

In order to warrant or support a finding that an omission is a proximate cause of an injury, injury at least in some form must be shown by a preponderance of the evidence to have been foreseeable by the defendant, in the exercise of ordinary prudence, in the light of the attending circumstances.

Defendant's Proposed Instruction No. 35-A

One test to be applied in deciding whether there was or was not a negligent failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work is the following: Prior to the time that Nathanael Patrick Hutchison in some manner got into the ventilator shaft and fell to the bottom thereof would an ordinarily prudent person operating the SS "Linfield Victory" have anticipated that the pipe railings

surrounding the opening at the top of the ventilator shaft were not reasonably sufficient to protect a seaman exercising ordinary care for his own safety and in the full possession of normal faculties from inadvertently falling into said ventilator shaft? If you answer this question in the negative, there was no negligent failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work.

Defendant's Proposed Instruction No. 36

One of the required elements involved in the proof of negligence on the part of a defendant ship owner is that there must be substantial evidence justifying a finding that under the existing circumstances the ship operator should reasonably have anticipated the danger of bodily injury or death to a member of the crew.

Defendant's Proposed Instruction No. 36-A

One of the required elements involved in the proof of negligence on the part of a defendant ship owner is that there must be evidence, direct or indirect, justifying a finding that under the existing circumstances the ship operator should reasonably have anticipated the danger of bodily injury or death to a member of the crew.

Defendant's Proposed Instruction No. 37

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such

an accident to be avoided. They simply denote an accident that occurred without having been proximately cause by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight or caution, still, no one may be held liable for injuries or death resulting from it.

Defendant's Proposed Instruction No. 38

You may not indulge in speculation, surmise or conjecture with respect to any of the matters or elements as to which the law places the burden of proof upon the plaintiff.

Defendant's Proposed Instruction No. 39

You are not permitted to speculate, conjecture or surmise with respect to when, how or in what manner Nathanael Patrick Hutchison sustained the injuries resulting in his death.

Defendant's Proposed Instruction No. 40

You are instructed that the pipe railings installed around the open sides of the ventilator shaft were supplied for the purpose of preventing any seaman, while exercising ordinary care for his own safety, from inadvertently falling into said ventilator shaft in the course of his employment, and that said pipe railings constituted a safety appliance for that purpose. If you find from the evidence the said pipe railings constituted all that a reasonably prudent employer would have furnished in the way of safety appliances in and about the

ventilator shaft in order to provide a reasonably safe place to work your verdict on both claims asserted by plaintiff must be in favor of the defendant.

Defendant's Proposed Instruction No. 40-A

You are instructed that the pipe railings installed around the open sides of the ventilator shaft were supplied for the purpose of preventing any seaman, while exercising ordinary care for his own safety, from inadvertently falling into said ventilator shaft in the course of his employment, and that said pipe railings constituted a safety appliance for that purpose. If you find from the evidence the said pipe railings constituted all that a reasonably prudent employer would have furnished in the way of safety appliances in and about the ventilator shaft in order to provide a reasonably safe place to work, your finding with respect to said issue of fact must be in favor of the defendant.

Defendant's Proposed Instruction No. 41

Negligence on the part of a defendant cannot be inferred from a presumption of care on the part of the person who has suffered injury or who has suffered death.

Defendant's Proposed Instruction No. 42

The employer of a seaman is not an insurer or guarantor of his safety or life. The design and construction of an appliance is not required by law to be absolutely safe to the end that it is impossible

for a seaman to be injured or to lose his life. The law did not impose upon the defendant an absolute duty of furnishing an accident-proof ventilator shaft.

Defendant's Proposed Instruction No. 43

A steamship operator is not guilty of actionable negligence in the event such operator merely fails to anticipate carelessness or lack of care upon the part of an employee who may suffer injury.

Defendant's Proposed Instruction No. 44

The defendant in this case has admitted that there was no permanent artificial lighting fixture installed in that part of masthouse No. 2 where the ventilator shaft referred to in the evidence was located. In this connection, you are instructed that the absence of artificial illumination inside of said masthouse is of no importance whatever and must be entirely disregarded by you unless the plaintiff has proved by a preponderance of evidence that the inside of said masthouse was in a state of darkness and that artificial illumination was reasonably required in order to supply him with a reasonably safe place to work.

Defendant's Proposed Instruction No. 44-A

You are instructed that the absence of artificial illumination inside of said masthouse is of no importance whatever and must be entirely disregarded by you unless the plaintiff has proved by a preponderance of evidence that the actual visibil-

ity inside of said masthouse, at or immediately before Nathanael P. Hutchison fell, was such that artificial illumination was reasonably required in order to supply him with a reasonably safe place to work.

Defendant's Proposed Instruction No. 45

If you find from all of the evidence that the pipe railings surrounding the ventilator shaft in masthouse No. 2 constituted a reasonably sufficient safety appliance about said ventilator shaft and that the masthouse was, with the presence of said pipe railings about the ventilator shaft and without any additional safeguard therein or about the same, a reasonably safe place to work and that the plaintiff has failed to prove by a preponderance of evidence that any artificial illumination was reasonably required, your verdict must be in favor of the defendant with respect to each of plaintiff's claims.

Defendant's Proposed Instruction No. 45-A

If you find from all of the evidence that the pipe railings surrounding the ventilator shaft in masthouse No. 2 constituted a reasonably sufficient safety appliance about said ventilator shaft and that the masthouse was, with the presence of said pipe railings about the ventilator shaft and without any additional safeguard therein or about the same, a reasonably safe place to work and that the plaintiff has failed to prove by a preponderance of evidence that any artificial illumination was reasonably required, your verdict must be in favor of

the defendant as to plaintiff's claims with respect to the place of work.

Defendant's Proposed Instruction No. 46

There is a distinction between contributory negligence and negligence on the part of an employee which is the sole proximate cause of his injury or death. Contributory negligence is of importance in this case only if you find from all of the evidence that the defendant negligently failed or neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work and that he suffered personal injury and death as a proximate result of such, if any, failure or neglect. In such case, if you so find from the evidence, it is your duty to diminish the damages in proportion to the negligence, if any, on the part of Nathanael Patrick Hutchison proximately contributing to his own injury and death. On the other hand, if you find from all of the evidence that the sole proximate cause of the injury and death of Nathanael Patrick Hutchison was negligence on his part, then your verdict must be in favor of the defendant.

Defendant's Proposed Instruction No. 47

Nathanael Patrick Hutchison was required at all times to exercise that amount of care and caution which would have been exercised under the same or similar circumstances by an ordinarily prudent person to observe and avoid danger. In the absence

of evidence, direct or indirect, to the contrary, the law presumes that he had notice of everything which an ordinarily careful seaman would have known under the same or similar circumstances. If Nathanael Patrick Hutchison did anything which an ordinarily prudent seaman would not have done under the same or similar circumstances or failed to do anything which an ordinarily prudent seaman would have done under the same or similar circumstances then it will be your duty to find that Nathanael Patrick Hutchison was guilty of negligence. If you find that he was guilty of negligence and that such, if any, negligence was the sole proximate cause of personal injury and death, your verdict must be in favor of the defendant with respect to each claim asserted by the plaintiff.

Defendant's Proposed Instruction No. 48

The mere fact that an accident happened, considered alone, does not support an inference that the defendant was negligent.

B.A.J.I. No. 131.

Defendant's Proposed Instruction No. 49

The law does not permit you to guess or speculate as to negligence or as to the proximate cause of the injuries or death of Nathanael Patrick Hutchison. If the evidence on the issue of claimed negligence on the part of the defendant or proximate cause does not preponderate in favor of the plaintiff, then she has failed to fulfill her burden of proof. If after considering all of the evidence you

find that it is just as probable that either the defendant was not negligent or that, if it was, its negligence was not a proximate cause of the injuries or death, as it is that some negligence on its part was such a cause, then a case against the defendant has not been established.

Adapted from B.A.J.I. No. 132.

Defendant's Proposed Instruction No. 50

By the same principle, it follows that if you should find that it is just as probable that Nathanael Patrick Hutchison was free from negligence, or even if negligent, that his negligence did not contribute as a proximate cause of the injury and death, as it is that negligence on his part did contribute as a proximate cause, then contributory negligence has not been established.

Adapted from B.A.J.I. No. 132-A.

Defendant's Proposed Instruction No. 51

In determining whether negligence or proximate cause or contributory negligence has been proved by a preponderance of evidence, you must consider all of the evidence, direct or indirect, bearing either way upon the question, regardless of which party produced it. A party is entitled to the same benefit from evidence that favors his cause or defense when produced by his adversary as when produced by himself. Thus, if the evidence produced by the plaintiff fails to prove negligence on the part of defendant by a preponderance thereof or fails to

prove by a preponderance that Nathanael Patrick Hutchison suffered injury or death as a proximate result of such, if any, negligence, your verdict would have to be in favor of the defendant, even if the defendant has produced no evidence whatever upon the subjects of alleged negligence on its part or proximate cause.

Adapted from B.A.J.I. No. 133.

Defendant's Proposed Instruction No. 52

The disputable presumption that Nathanael Patrick Hutchison exercised ordinary care for his own safety cannot be used by you as a basis of a finding that the defendant failed or neglected to supply reasonably sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work. Therefore, in deciding whether the defendant did or did not fail or neglect to supply reasonably sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work you are precluded from basing a finding with respect to that issue of fact directly or indirectly upon the disputable presumption that Nathanael Patrick Hutchison exercised ordinary care for his own safety.

Defendant's Proposed Instruction No. 53

In the event you find from all of the evidence that Nathanael Patrick Hutchison was not guilty of negligence proximately causing or proximately contributing to his injury and death, you are not entitled to presume or infer from such finding that

the defendant negligently failed or neglected to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work. In other words, the mere fact, if it be a fact, that Nathanael Patrick Hutchison was not guilty of negligence proximately causing or proximately contributing to his injury and death does not justify a finding that his injury and death must have been or was a negligent failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work.

Defendant's Proposed Instruction No. 54

There was no duty on the part of the defendant to anticipate or provide against a negligent, careless or improper use of any safety appliance or a failure on the part of any seaman to exercise ordinary care in or about the use of any safety appliance actually installed about the ventilator shaft.

Defendant's Proposed Instruction No. 55

A steamship company is not a guarantor or insurer of the safety of a place of work or of the appliances used in connection with the work. It is the duty of a steamship company to exercise reasonable care to the end that the employee be furnished with reasonably safe appliances in order to provide a reasonably safe place to work. The basis of liability on the part of a ship owner is not the single factor of injury or death but whether the

injury or death in the course of employment has been proximately caused or proximately contributed to by a negligent failure on the part of the ship owner to furnish a reasonably safe place in which to work or reasonably safe means of going or coming to and from a place of work.

Defendant's Proposed Instruction No. 55-A

A steamship company is not a guarantor or insurer of the safety of a place of work or of the appliances used in connection with the work. It is the duty of a steamship company to exercise reasonable care to the end that the employee be furnished with reasonably safe appliances in order to provide a reasonably safe place to work. The basis of liability on the part of a ship owner with respect to the place of work or the means of getting to and from the place of work, is not the single factor of injury or death, but whether the injury or death in the course of employment has been proximately caused or proximately contributed to by a negligent failure on the part of the ship owner to furnish a reasonably safe place in which to work or reasonably safe means of going or coming to and from a place of work.

Defendant's Proposed Instruction No. 56

In the instructions which have been given to you and in some which may be given to you the phrase "reasonably safe" is used. A safety appliance is reasonably sufficient in the event it is one which in and of itself would be deemed adequate by an or-

dinarily prudent employer under the same or similar circumstances.

Defendant's Proposed Instruction No. 57

An appliance is reasonably safe when it furnishes such safeguards to life and limb as would be provided by an ordinarily prudent employer under the same or similar circumstances. In other words, a safety appliance is reasonably sufficient if in and of itself it is one which an ordinarily prudent employer of seamen would supply for the purpose of safeguarding a ventilator shaft located inside a masthouse of a vessel under circumstances the same as or similar to those shown by the evidence in this case.

Defendant's Proposed Instruction No. 57-A

An appliance is reasonably safe when it furnishes such safeguards to life and limb as would be provided by an ordinarily prudent employer under the same or similar circumstances. In other words, a safety appliance is reasonably sufficient if in and of itself it is all that an ordinarily prudent employer of seamen would supply for the purpose of safeguarding a ventilator shaft located inside a masthouse of a vessel under circumstances the same as or similar to those shown by the evidence in this case.

Defendant's Proposed Instruction No. 58

You are instructed that the "Linfield Victory" was owned by the United States of America, De-

partment of Commerce, and that it was a "steam vessel". An act of Congress in full force and effect at all times referred to in the evidence in this case provided that all steam vessels owned by the Department of Commerce shall be subject to all of the provisions of Title 52 of the Revised Statutes for the Regulation of Steam Vessels and all acts amendatory thereof or supplemental thereto. An applicable statute enacted by the Congress, in full force and effect in so far as this case is concerned, provided that the Coast Guard shall, once in every year, at least, carefully inspect the hull of each steam vessel, and shall satisfy itself that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, * * * and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life, and that all the requirements of law in regard to fires, boats, pumps, hose, life preservers, floats, anchors, and cables and other things are faithfully complied with. * * * The statute also provided that whenever the Coast Guard shall find on board any steam vessel such as the "Linfield Victory", as part of the required equipment thereof, any equipment, apparatus or appliances not conforming to the requirements of law, it shall require the same to be placed in proper condition by the owner or master of said vessel, if possible, and that in any of the foregoing cases the Coast Guard official by whom or under whose supervision said vessel is then being inspected shall have power to enforce the foregoing requirements

by revoking the certificate of said vessel, and by refusing to issue a new certificate to the said vessel until the said requirements shall have been fully complied with.

The applicable statute enacted by the Congress also provided that when the inspection of a steam vessel is completed and the Coast Guard approves the vessel and her equipment throughout, it shall make and subscribe a certificate, which certificate shall be verified by the oath of the Coast Guard official signing it, before the chief officer of the customs of the district or any other person competent by law to administer oaths. Said statute also provided that such certificate shall be delivered to the master or owner of the vessel to which it relates, and one copy thereof shall be kept on file in the Coast Guard official's office and one copy thereof delivered to the collector or other chief officer of the customs of the district in which such inspection has been made, who shall keep the same on file in his office. The statute also provided that no vessel required to be inspected under the provisions of Title 52 of the Revised Statute shall be navigated without having on board an unexpired regular certificate of inspection.

You are instructed that it is a presumption of law, in the absence of evidence to the contrary, that there was on board the "Linfield Victory" at all times referred to in the evidence in this case, an unexpired regular certificate of inspection and that such certificate of inspection had been issued by the Coast Guard and that all duties imposed by law

upon the Coast Guard with reference to the inspection of said "Linfield Victory" had been regularly performed and that the Coast Guard had obeyed the law and that the defendant also obeyed the law. Unless these presumptions have been controverted by other evidence, direct or indirect, you are bound to find according to such presumptions.

Defendant's Proposed Instruction No. 58-A

You are instructed that the "Linfield Victory" was owned by the United States of America, Department of Commerce, and that it was a "steam vessel." An applicable statute enacted by the Congress, in full force and effect in so far as this case is concerned, provided that the Coast Guard shall, once in every year, at least, carefully inspect the hull of each such steam vessel, and shall satisfy itself that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, * * * and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life.

The applicable statute enacted by the Congress also provided that when the inspection of a steam vessel is completed and the Coast Guard approves the vessel and her equipment throughout, it shall make and subscribe a certificate, which certificate shall be verified by the oath of the Coast Guard official signing it, before the chief officer of the customs of the district or any other person competent by law to administer oaths. Said statute also pro-

vided that such certificate shall be delivered to the master or owner of the vessel to which it relates, and one copy thereof shall be kept on file in the Coast Guard official's office and one copy thereof delivered to the collector or other chief officer of the customs of the district in which such inspection has been made, who shall keep the same on file in his office. The statute also provided that no vessel required to be inspected under the provisions of said Statute shall be navigated without having on board an unexpired regular certificate of inspection.

You are instructed that it is a presumption of law, in the absence of evidence to the contrary, that there was on board the "Linfield Victory" at all times referred to in the evidence in this case, an unexpired regular certificate of inspection and that such certificate of inspection had been issued by the Coast Guard and that all duties imposed by law upon the Coast Guard with reference to the inspection of said "Linfield Victory" had been regularly performed and that the Coast Guard obeyed the requirements of said statute. Unless this presumption has been controverted by other evidence, direct or indirect, you are bound to find according to such presumption.

Defendant's Proposed Instruction No. 59

You are instructed that regardless of the fact that the "Linfield Victory" was moored to or tied up at a dock at Baltimore, Maryland, on April 24, 1951,

the said vessel was in navigation. You are further instructed that the law presumes, in the absence of evidence to the contrary, that there was on board said vessel at said date an unexpired regular certificate of inspection and that said unexpired regular certificate of inspection had been made and subscribed by a duly authorized official of the Coast Guard and that it had been delivered to the master or owner of said "Linfield Victory". You are further instructed that the law presumes, in the absence of evidence to the contrary, that before the issuance of such certificate of inspection, an inspection of said "Linfield Victory" had been completed by the Coast Guard and that the Coast Guard had approved the vessel and her equipment throughout and that the Coast Guard did, prior to issuing said certificate of inspection, carefully inspect the hull of said steam vessel and satisfied itself that such vessel was of a structure suitable for the service in which she was to be employed and was in a condition to warrant the belief that she could be used in navigation as a steamer, with safety to life, and that all of the requirements of law in regard to fires, boats, pumps, hose, life preservers, floats, anchors, cables, and other things were faithfully complied with and that the said Coast Guard did not find on board said "Linfield Victory" any equipment, apparatus or appliances not conforming to the requirements of law. You must find in accordance with such presumptions unless there is other evidence, direct or indirect, controverting such presumptions.

Defendant Proposed Instruction No. 60

You are instructed that regardless of the fact that the "Linfield Victory" was moored or tied to a dock at Baltimore, Maryland, on April 24, 1951, said "Linfield Victory" was at said time being used in navigation as a steamer; and it is a presumption of law in accordance with which you are bound to find, unless controverted by other evidence, direct or indirect, that the Coast Guard had carefully inspected the hull of said vessel and had satisfied itself that said vessel was of a structure suitable for the service in which she was to be employed and was in a condition to warrant the belief that she might be used in navigation with safety to life and that all requirements of law were faithfully complied with and that it did not find on board said vessel, as part of the required equipment thereof, any equipment, apparatus or appliances not conforming to the requirements of law.

Defendant's Proposed Instruction No. 61

You have been instructed on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages, and the fact that they have been given to you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict. The fact that instructions on the subject of damages have been given must not be considered by you one way

or the other in deciding whether liability does or does not exist.

Adapted from B.A.J.I. No. 180.

Defendant's Proposed Instruction No. 62

Under our practice it is the right of the attorney for each of the parties to present argument to you with reference to the evidence which has been introduced. You are not bound by any argument made by either of the attorneys. No statement made by either attorney during his argument is evidence of any fact in issue in the case.

Defendant's Proposed Instruction No. 63

After you have retired for deliberation, if there be a disagreement between you as to any part of the testimony or evidence which has been introduced or if you or any of you desire to be informed with reference to any point of law applicable to the case, it is your privilege and duty to require the deputy marshal to communicate such fact to the court and you will then be returned to the courtroom for whatever aid the court may give you with respect to any such matter. The foreman of the jury has no power to decide questions of law either for himself or any other member of the jury. If a dispute or uncertainty with reference to any point of law developes during your deliberations, only the court may resolve such dispute. While the foreman of the jury will preside over your deliberations, such foreman has no right or power to decide any question of fact for anyone excepting himself.

Defendant's Proposed Instruction No. 64

You have been instructed that the defendant in this case admits that Nathanael Patrick Hutchison did not meet his death by reason of either foul play or suicide. You are further instructed that you can not infer or presume from the admitted fact that Nathanael Patrick Hutchison did not meet his death by reason of either foul play or suicide that his death resulted in whole or in part from negligence on the part of the defendant or on the part of any licensed officer of the ship or on the part of any agent or employee of the defendant.

Defendant's Proposed Instruction No. 65

Every finding which you make during your deliberations and which is used as a basis upon which you arrive at and render a verdict must be based upon direct or indirect evidence. (At this point the defendant requests the court to insert and read verbatim the provisions of Sections 1831 and 1832 of the California Code of Civil Procedure.)

You are further instructed that you are not entitled to indulge in any presumption from direct or other evidence actually introduced into the record unless the court states to you specifically that you are entitled to indulge in some specific presumption or presumptions. While you are entitled to decide the credibility of a witness you are not entitled to add anything to the actual evidence which has been introduced. In other words, while you may, if you believe you are justified in doing so, disbelieve all or any part of the testimony of any witness who

has testified before you either by way of deposition or in person, you can not add anything to the testimony of any such witness.

Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

Proof is the effect of evidence, the establishment of a fact by evidence.

There are four kinds of evidence:

1. The knowledge of the court;
2. The testimony of witnesses;
3. Writings;
4. Other material objects presented to the senses.

There are several degrees of evidence:

1. Primary and secondary;
2. Direct and indirect;
3. Prima facie, partial, satisfactory, indispensable, and conclusive.

Primary evidence is that kind of a evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents.

Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument or oral evidence of its contents is secondary evidence of the instrument and contents.

Direct evidence is that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.

Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence.

Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence.

Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts.

A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own preceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

Defendant's Proposed Instruction No. 66

You are instructed that there is no obligation resting upon the defendant in this case to produce either in person or by deposition the testimony of any person who may have been aboard the vessel SS "Linfield Victory" at any time while the said vessel was in the Port of Baltimore, Maryland, for

any purpose whatever. You are not entitled to presume or infer that if the defendant had produced, either in person or by deposition, the testimony of any person who may have been aboard the vessel "Linfield Victory" while it was in the Port of Baltimore, Maryland, or any other person who was in the City of Baltimore, Maryland, at any time while the said vessel was at that port that such testimony would constitute any evidence whatever in favor of the plaintiff's claim that the defendant failed to supply sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place to work or that the life of Nathanael Patrick Hutchison could have been saved by a surgical operation or any other kind of medical care and attention.

Note: This proposed instruction is also based, in part, upon the proposition that the disputable presumption that higher evidence would be adverse from inferior being proposed is applicable only with respect to the proof of an issue of fact as to which the burden of proof rests upon the particular party who has produced the inferior evidence or has failed to produce all evidence available to such party upon whom the burden of proof rests.

[Endorsed]: Filed October 6, 1955.

[Endorsed]: "A" with exception of 35-A Instructions filed October 12, 1955.

[Title of District Court and Cause.]

QUESTIONS SUBMITTED BY THE JURY

Some jurors recall that someone (?) testified that they had observed screens on the ventilator shafts of other Victory ships. Do you recall any such testimony?—Signed Wm. H. Eager, Foreman.

Is it necessary that the jury find that there was conscious pain and suffering in order to arrive at a verdict for the plaintiff under the first cause of action?—Signed W. H. Eager, Foreman.

Honorable Judge Tolin:

Re-read your instructions regarding failure to conduct a search, and that this form of negligence could apply only to the first cause of action; explain why this cannot apply to the second cause of action.

Read again the two causes of action set forth in the complaint.

Do interrogatories apply only to the second cause of action and not the first? If so, does it follow that contributory negligence on the part of the deceased should not be considered in the verdict as to the first cause of action?

[Endorsed]: Filed October 15, 1955.

[Title of District Court and Cause.]

VERDICT

First Cause of Action (Personal Injuries)

Upon the First Cause of Action, we the Jury find in favor of the Defendant, Pacific-Atlantic Steam-

ship Company, and against the Plaintiff, Emma Hutchison, Administratrix of the Estate of Nathanael Patrick Hutchison, Deceased.

Dated at Los Angeles, California, this 15th day of October, 1955.

/s/ WILLIAM H. EAGER,
Foreman of the Jury

[Endorsed]: Filed October 15, 1955.

[Title of District Court and Cause.]

VERDICT

Second Cause of Action (Damages for Death)

Upon the Second Cause of Action, we the Jury find in favor of the Plaintiff, Emma Hutchison, Administratrix of the Estate of Nathanael Patrick Hutchison, Deceased, and against the Defendant, Pacific-Atlantic Steamship Company, and fix plaintiff's damages in the sum of Forty-five thousand dollars (\$45,000.00).

Dated at Los Angeles, California, this 15th day of October, 1955.

/s/ WILLIAM H. EAGER,
Foreman of the Jury

[Endorsed]: Filed October 15, 1955.

[Title of District Court and Cause.]

INTERROGATORIES SUBMITTED TO JURY

If the Verdict is in favor of Plaintiff, answer these interrogatories:

Interrogatory No. 1: What are the total pecuniary damages sustained by Emma Hutchison by reason of the death of Nathanael Patrick Hutchison? \$50,000.00.

Interrogatory No. 2: Was Nathanael Patrick Hutchison guilty of any negligence which proximately contributed to his death?

Answer "Yes" or "No": Yes.

Interrogatory No. 3: A. If your answer to Interrogatory No. 2 is "Yes", state the extent in percentage that the negligence of Nathanael Patrick Hutchison proximately contributed to his death.

Ten per cent (10%).

B. Translate the percentage into dollars as a percentage of the amount given by you in answer to Interrogatory No. 1. What is the amount thus computed?

\$5,000.00.

Interrogatory No. 4: Subtract the amount of money stated by you in answer to Interrogatory No. 3-B from the amount of money stated by you in your answer to Interrogatory No. 1. What is the result of this computation?

\$45,000.00.

The handwritten portion of the foregoing constitute answers made by the jury to the typewritten portion which are interrogatories submitted to the jury for its answers.

Dated: October 15th, 1955.

/s/ WILLIAM H. EAGER,

Foreman of the Jury

[Endorsed]: Filed October 15, 1955.

In the United States District Court for the Southern District of California, Central Division
No. 13,569-T Civil

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison, Deceased,
Plaintiff,

vs.

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a corporation, et al., Defendants.

JUDGMENT ON THE VERDICT

This cause having been regularly tried by jury duly impanelled and sworn; Raymond C. Simpson, Esq., appearing as counsel for the plaintiff and Lasher B. Gallagher, Esq., appearing as counsel for the defendant; and the trial having proceeded on October 4, 5, 6, 7, 11, 12, 13, 14 and 15, 1955; and the jury having returned on October 15, 1955 its verdict as to the First Cause of Action (Personal Injuries) and the Second Cause of Action, (Damages for Death) to the complaint as follows:

1. As to the First Cause of Action the Jury finds in favor of the defendant and against the plaintiff;

2. As to the Second Cause of Action the Jury finds in favor of the plaintiff and against the defendant and fixes plaintiff's damages in the sum of \$45,000.00;

Now, Therefore, in accordance with the aforesaid premises and said verdicts, and pursuant to law,

It Is Ordered, Adjudged and Decreed that judgment be entered in favor of the Defendant as to the First Cause of Action and against the Plaintiff, and that judgment be entered in favor of the Plaintiff as to the Second Cause of Action and against the Defendant, in sum of \$45,000.00 damages and costs taxed at \$125.70.

Witness, the Honorable Ernest A. Tolin, United States District Judge, Southern District of California, this 15th day of October, 1955.

JOHN A. CHILDRESS,
Clerk

/s/ By WM. A. WHITE,
Deputy Clerk

[Endorsed]: Filed, Entered and Docketed October 18, 1955.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITH-
STANDING OR, IN ALTERNATIVE FOR
A NEW TRIAL

The defendant, Pacific-Atlantic Steamship Company, a corporation, hereby moves to have the verdict of the jury on the second cause of action and the judgment entered thereon set aside and to have judgment entered in accordance with its motion for a directed verdict made at the close of all of the evidence or, in the alternative, that a new trial be granted with respect to said cause of action and, to that end, that the verdict and judgment entered

upon said second cause of action be vacated and set aside.

The grounds upon which the defendant moves to have the verdict and the judgment with respect to the second cause of action set aside and to have judgment entered in accordance with its motion for a directed verdict are as follows:

1. The evidence is insufficient to support the implied finding of the jury that at the time Nathanael Patrick Hutchison suffered the personal injuries as a result of which he died the relationship of employer and employee existed between Pacific-Atlantic Steamship Company, a corporation, and Nathanael Patrick Hutchison.

2. The evidence is insufficient to support the implied finding of the jury that the death of Nathanael Patrick Hutchison was a result of any personal injury suffered by him in the course of his employment.

3. The evidence is insufficient to support the implied finding of the jury that the death of Nathanael Patrick Hutchison resulted in whole or in part by reason of any insufficiency in and about or in or about the ventilator shaft referred to in Paragraph VIII of the first cause of action incorporated by reference thereto in the second cause of action.

4. The evidence is insufficient to support the implied finding of the jury that the death of Nathanael Patrick Hutchison resulted in whole or in part by reason of any insufficiency, due to defendant's negligence, in its appliances in and about or in or about the ventilator shaft referred to in Para-

graph VIII of the first cause of action and incorporated by reference thereto in the second cause of action.

5. The evidence is insufficient to support the implied finding of the jury that the defendant failed or neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about or in or about said ventilator shaft to provide a reasonably safe place in which to work.

6. The evidence is insufficient to support the implied finding of the jury that Nathanael Patrick Hutchison fell into said ventilator shaft in the course of the performance of any duty as an employee or in the course of his employment.

7. The evidence is insufficient to support the implied finding of the jury that said ventilator shaft was an open ventilator shaft.

8. The evidence is insufficient to support the implied findings of the jury in favor of the plaintiff with respect to the material issues of fact raised by those averments of Paragraphs VII, VIII, and IX of the first cause of action incorporated by reference thereto in the second cause of action and the averments of Paragraph II of the second cause of action which are denied in the answer of the defendant with respect thereto.

9. By reference thereto the defendant incorporates herein each and every ground upon which it made its motion for a directed verdict at the close of all of the evidence with respect to the claimed cause of action designated as the "Second Cause

of Action" in the First Amended Complaint of plaintiff.

10. The evidence fails to show any actionable negligence on the part of the defendant in that there is no evidence, direct or indirect, which will support the verdict of the jury or the implied findings of the jury that the death of Nathanael Patrick Hutchison resulted in whole or in part by reason of any insufficiency, due to defendant's negligence, in its appliances in and about or in or about the ventilator shaft located in the forward port section of the port compartment of masthouse No. 2 on the steamship "Linfield Victory".

Said motion to have the verdict and the judgment on the second cause of action set aside and to have judgment entered in accordance with defendant's motion for a directed verdict made at the close of all of the evidence is based upon the foregoing grounds and each thereof; upon the material issues of fact raised by the pleadings with respect to said second cause of action, and upon all of the competent, material and relevant evidence, oral or documentary in the record made during the trial and as shown by the records and minutes kept by the clerk of the court and by the notes of the official court reporter.

In accordance with the provisions of subdivision (b), Rule 50, Federal Rules of Civil Procedure, defendant prays and moves, in the alternative, for a new trial, as follows:

Defendant hereby moves the court for an order and decision setting aside the verdict with respect

to the second cause of action and the judgment entered thereon and that a new trial be granted to the defendant with respect to said second cause of action upon the following grounds and each thereof materially affecting the substantial rights of defendant:

1. Irregularity in the proceedings and conduct of the court.

2. Irregularity in the conduct of and misconduct upon the part of the attorney for the plaintiff.

3. Orders of the court by which the defendant was prevented from having a fair trial.

4. Abuse of judicial discretion by which the defendant was prevented from having a fair trial.

5. Insufficiency of the evidence to justify the verdict.

6. The verdict is against law.

7. Errors in law occurring at the trial and excepted to by the defendant.

7A. Errors in law occurring at the trial, in the following particulars: A. The refusal of the court to strike the averments of Paragraph IX from the first amended complaint. B. Permitting the plaintiff to offer prejudicial and passion arousing evidence with respect to searching for Nathanael Patrick Hutchison in that there was no legal duty imposed upon the defendant to conduct any search for him and the first amended complaint does not contain any averments sufficient to show the existence of any legal duty upon the part of the defendant to conduct any search or that there was any actionable negligence in this respect. C. The refusal

of the court to grant defendant's motion for a directed verdict upon the second count of the first amended complaint. D. The admission into evidence of those portions of the testimony of Amundsen, Castle and Crawford with respect to what such witnesses claimed to have seen on other ships in connection with masthouses or ventilator shafts and with respect to claimed customs or practices and the refusal of the court to require the plaintiff to show any necessity of artificial illumination within masthouse No. 2 on the steamship "Linfield Victory" on April 24, 1951; the admission of improper evidence and the refusal of the court to grant defendant's motions to strike testimony and other evidence in accordance with said motions; and in this respect the defendant by reference thereto incorporates herein each question asked of each witness and other evidence to which an objection was made by the defendant and the objection made thereto by the defendant and the answer to each such question and the motion to strike such testimony and other evidence specified therein as shown by the reporter's notes or transcript of the proceedings at the trial. E. The refusal of the court to allow the defendant an additional 10 minutes on October 13, 1955, to cover essential matters overlooked in the argument of its attorney on the previous afternoon. F. The failure of the court in the instructions given to the jury of its own motion to fairly or completely or at all to state or define the issues of material fact raised by the averments of the first amended complaint and the denials and

averments of the answer to said pleading; the failure of the court to instruct the jury with respect to the statutory bases of possible liability on the part of the defendant as to plaintiff's claim for damages by reason of the death of Nathanael Patrick Hutchison; the failure of the court to instruct the jury with respect to essential elements of actionable negligence on the part of the defendant in connection with and as limited by the averments of a claimed failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in the port compartment of masthouse No. 2 to provide a reasonably safe place in which to work; the failure of the court to properly instruct with respect to the specific burden of proof imposed upon the plaintiff or to fully instruct thereon; the refusal of the court to properly or adequately instruct the jury with respect to the duties imposed by law upon the defendant and Nathanael Patrick Hutchison with respect to the subjects of actionable negligence on the part of the defendant, contributory negligence on the part of Nathanael Patrick Hutchison, and negligence on the part of the latter as a sole proximate cause of his injuries and death; the instructions given to the jury by the court of its own motion are incomplete, inadequate, inaccurate and unfair to the defendant and do not cover the law applicable to the legal liability imposed by the Jones Act, the issues of material fact raised by the pleadings or the competent, relevant and material evidence introduced by the respective parties; the

instructions given by the court of its own motion contain much matter which is completely extraneous to proper statements of law which can be given to a jury as the law applicable to the issues and evidence in the case at bar; the court in its instructions made improper, unfair and inaccurate comments with respect to the subjects of actionable negligence on the part of defendant and contributory negligence on the part of Nathanael Patrick Hutchison; the court improperly instructed with respect to disputed questions of fact and also gave contradictory instructions thereon; the court improperly refused to give correct instructions upon the applicable principles of law as requested by the defendant or to give, in lieu thereof, the substance of those portions of defendant's proposed instructions which are not covered in substance or at all in the instructions actually given to the jury; and in particular, the court improperly refused to give or to otherwise correctly or adequately cover the applicable principles of law contained in the following instructions proposed by the defendant and delivered to the court on or before October 12, 1955: Numbers 5, 6, 10, 11, 11A, 12, 13, 14, 14A, 15, 15A, 16, 16A, 17, 18, 19, 19A, 23, 24, 25, 28, 29, 30, 30A, 31, 31A, 32, 32A, 33, 34, 35, 35A, 36, 36A, 38, 39, 40, 40A, 41, 42, 43, 44A, 45, 45A, 47, 49, 51, 52, 53, 54, 55, 55A, 56, 57, 57A, 58, 58A, 59, 60, 65 and 66.

The court improperly refused to submit to the jury and require an answer to defendant's proposed interrogatory number 3: "On what date and at what time on said date did Nathanael Patrick

Hutchison come in contact with the bottom of the ventilator shaft?"

8. Errors in law occurring at the trial as to which the defendant has automatic exceptions pursuant to Rule 46, Federal Rules of Civil Procedure.

9. The evidence is insufficient to support the implied finding of the jury that at the time Nathanael Patrick Hutchison suffered the personal injuries as a result of which he died the relationship of employer and employee existed between Pacific-Atlantic Steamship Company, a corporation, and Nathanael Patrick Hutchison.

10. The evidence is insufficient to support the implied finding of the jury that the death of Nathanael Patrick Hutchison was a result of any personal injury suffered by him in the course of his employment.

11. The evidence is insufficient to support the implied finding of the jury that the death of Nathanael Patrick Hutchison resulted in whole or in part by reason of any insufficiency of any appliance or appliances in and about or in or about the ventilator shaft referred to in Paragraph VIII of the first cause of action incorporated by reference thereto in the second cause of action.

12. The evidence is insufficient to support the implied finding of the jury that the death of Nathanael Patrick Hutchison resulted in whole or in part by reason of any insufficiency, due to defendant's negligence, in its appliances in and about or in or about the ventilator shaft referred to in Paragraph VIII of the first cause of action and in-

incorporated by reference thereto in the second cause of action.

13. The evidence is insufficient to support the implied finding of the jury that the defendant failed or neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about or in or about said ventilator shaft to provide a reasonably safe place in which to work.

14. The evidence is insufficient to support the implied finding of the jury that Nathanael Patrick Hutchison fell into said ventilator shaft in the course of the performance of any duty as an employee or in the course of his employment.

15. The evidence is insufficient to support the implied finding of the jury that said ventilator shaft was an open ventilator shaft.

16. The evidence is insufficient to support the implied findings of the jury in favor of the plaintiff with respect to the material issues of fact raised by those allegations and averments of Paragraphs VII, VIII, and IX of the first cause of action incorporated by reference thereto in the second cause of action and the averments of Paragraph II of the second cause of action and which are denied in the answer of the defendant with respect thereto.

17. The evidence fails to show any actionable negligence on the part of the defendant in that there is no evidence, direct or indirect, which will support the verdict of the jury or the implied findings of the jury that the death of Nathanael Patrick Hutchison resulted in whole or in part by reason of any insufficiency, due to defendant's negli-

gence, in its appliances in and about or in or about the ventilator shaft located in the forward port section of the port compartment of masthouse No. 2 on the steamship "Linfield Victory".

18. The evidence is insufficient to support the finding of the jury that plaintiff suffered damage in the sum of \$50,000.00.

19. The evidence is insufficient to support the finding of the jury that negligence on the part of the deceased, Nathanael Patrick Hutchison, did not proximately contribute to his death to any extent or in any proportion in excess of 10%.

Said motion in the alternative, for a new trial is based upon the foregoing grounds and each thereof, the material issues of fact raised by the pleadings with respect to the second cause of action, the records and minutes of the clerk of the court, and the notes of the official court reporter, and the affidavit of Lasher B. Gallagher, served and filed herewith.

/s/ LASHER B. GALLAGHER,
Attorney for Defendant Pacific-Atlantic Steamship
Company, a corporation

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 25, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Feb. 9, 1956, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge;

Deputy Clerk: Wm. A. White; Reporter: None; Counsel for Plaintiff: no appearance; Counsel for Defendant: no appearance.

Proceedings: It is Ordered that motion of defendant for judgment notwithstanding the verdict as to the second cause of action, or in the alternative, for a new trial, heretofore taken under submission, be, and it hereby is denied.

Clerk to notify counsel.

JOHN A. CHILDRESS,
Clerk

[Title of District Court and Cause.]

NOTICE OF APPEAL

Defendant Pacific-Atlantic Steamship Co., a corporation, hereby appeals to the United States Court of Appeals, Ninth Circuit, from that certain judgment on the claim designated in the first amended complaint on file herein as the "Second Cause of Action", in favor of plaintiff Emma Hutchison, administratrix of the estate of Nathanael Patrick Hutchison, deceased, and against defendant Pacific-Atlantic Steamship Co., a corporation, in the sum of Forty-five Thousand Dollars (\$45,000.00), and costs, said judgment having been entered in the Civil Docket on October 18, 1955; and also, in the event it is permissible to do so, from the orders entered in the above entitled action on or about February 9, 1956, denying defendant's motion for judgment notwithstanding the verdict as to said

“Second Cause of Action” or in the alternative for a new trial with respect to said “Second Cause of Action.”

Dated: February 27, 1956.

/s/ LASHER B. GALLAGHER,
Attorney for Defendant and Appellant, Pacific-Atlantic Steamship Co., a corporation

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 28, 1956.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND

Know All Men By These Presents:

Whereas, defendant Pacific-Atlantic Steamship Co., a corporation, has appealed or is about to appeal to the United States Court of Appeals, Ninth Circuit, from that certain final judgment on the cause of action designated in the First Amended Complaint as the “Second Cause of Action” heretofore docketed and entered in the above entitled cause on October 18, 1955; and

Whereas, Fireman's Fund Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California and qualified to act as a surety in this Court, is held and firmly bound unto the plaintiff herein and unto whom it may concern in the sum of Fifty Thousand Dollars (\$50,000.00), for the payment of which well and truly to be made it does hereby bind itself, its

successors and assigns, firmly by these presents and agrees that it is bound for the satisfaction of the said judgment in the principal sum of Forty-five Thousand Dollars (\$45,000.00) in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award.

The condition of this obligation is that if the above named appellant shall successfully prosecute its said appeal, then the above obligations on the part of Fireman's Fund Indemnity Company shall be void; otherwise the same shall be and remain in full force and effect.

Dated: February 24, 1956, at Los Angeles, California.

[Seal] FIREMAN'S FUND INDEMNITY
COMPANY, a corporation,

/s/ By MYRON C. HIGBY,
Attorney in Fact

Examined and recommended for approval as provided in local Rule 8.

/s/ LASHER B. GALLAGHER,
Attorney for Defendant and Appellant, Pacific-Atlantic Steamship Co., a corporation

The foregoing bond is hereby approved this 28 day of February, 1956.

/s/ ERNEST A. TOLIN,
United States District Judge

Notary Public Certificate attached.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 28, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 107, inclusive, contain the original

Order re Proposed Instructions and Form of Verdict;

Interrogatories Requested by Defendant;

Defendant's Proposed Instructions;

First Amended Complaint;

Motion to Dismiss, Motion for More Definite Statement and Motion to Strike;

Answer to First Amended Complaint;

Interrogatories Requested by Plaintiff of Jury;
Verdict;

Judgment on Verdict;

Interrogatories;

Answer to Interrogatories;

Request for Admissions under Rule 36;

Answer to Request for Admissions under Rule 36;

Verdict on First Cause of Action;

Verdict on the Second Cause of Action;

Interrogatories Submitted to Jury;

Judgment on the Verdict;

Notice of Appeal; Points on Which Defendant Intends to Rely;

Designation of Contents of Record;

Amendment to Designation of Contents of Record; which, together with a full, true and correct copy of the Minutes of the Court had on October 10, 1952; and February 9, 1956; and eight volumes of reporter's transcript of proceedings; deposition of Ernest Kalnin; deposition of Andreas Amundsen; and all exhibits admitted into evidence, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 6th day of April, 1956.

[Seal]

JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

In the United States District Court for the Southern District of California, Central Division
No. 13,569-T

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison, deceased,
Plaintiff,

vs.

PACIFIC-ATLANTIC STEAMSHIP CO., a corporation, et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, October 5, 1955

Honorable Ernest A. Tolin, Judge Presiding.

Appearances: For the Plaintiff: Raymond C. Simpson and Robert J. Kilpatrick, 110 West Ocean Boulevard, Long Beach, Calif. For the Defendant, Pacific-Atlantic Steamship Co., a corporation, Lasher B. Gallagher, 111 Sutter Street, San Francisco, California. [1*]

* * * * *

“Q. In tonnage and size of ship, is the Liberty ship comparable to the Victory ship?”

Mr. Gallagher: That question, if your Honor please,—

Do you want me to object to these as we are going along?

Mr. Simpson: Yes.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Mr. Gallagher: That question is objected to, if your Honor please, upon the ground that there is no proper foundation laid. That is one separate ground.

The next separate ground is that there is no relevancy to the specific issue alleged in the amended complaint, and I call your Honor's attention to an authority upon which your Honor relied when we were handling this same type of evidence in the first trial.

Your Honor read into the record at one time Section 461 of Wigmore on Evidence, third edition, but only read a portion of that section.

And the part that I desire to call to your Honor's attention, in support of my objection, is this: It is subdivision 3, on page 490:

"It is to be remembered that the principles of [5] Relevancy and of Auxiliary Policy (ante, Secs, 442-441) apply here, with the same limitations as in the preceding topics; i.e. (1) The conduct of others must have occurred under circumstances substantially similar, * * * " [6]

* * * * *

Mr. Simpson: Well, there are two points that we would urge in support of the question. One is that by way of preliminary qualifying background, having already elicited from the witness that he is quite familiar with Liberty ships, and that he has been aboard Victory ships, we are asking for the similarity of the two ships.

And that is the reason we ask if they are comparable, having established familiarity with both.

The Court: Of course, your comparability goes to size and doesn't relate to any specific portion of the vessel which is in issue in our particular case.

I think that this particular question is proper, and it will be deemed by this court that the objection is made at the time the deposition is being read in court, so that you need not interrupt the proceedings while we are actually before the jury to state the objections. [7]

* * * * *

The Court: I have given that a considerable bit of thought while this case was before the court of appeals, and the various problems in it have continually come back to me.

Now, that court did not speak upon this particular problem of evidence. What I now feel is that the general subject of holes and whatever is done to protect persons falling into them anywhere, within the area of activity in which the operator of the ship involved in this case would have occasion to note, would be relevant.

I don't think that you can say that what is done on a Victory ship must be done on a Liberty ship. But you can show, as we say in patent cases, the state of the art. [8]

You can show what is within the common knowledge of persons within the general field.

Mr. Gallagher: Well, may I call your Honor's attention to this: I respectfully suggest that your Honor, in your remarks, didn't speak with reference to the point of the objection.

I didn't say that the evidence had to relate to what is done on a Victory ship.

The Court: Oh, I went——

Mr. Gallagher: What I am talking about is the masthouse. That is the only area which is involved in this case and the only area which is referred to in the pleadings.

The Court: I think probably what is done to protect open areas of this kind at other places upon vessels is relevant. The degree of relevancy varies as you get further away from masthouses. It diminishes as you get further away from masthouses.

What is done with respect to hatches on the open deck, I think, would be a relevant line of inquiry.

Mr. Gallagher: May I ask counsel if he is willing to stipulate with respect to every question involving the matters within your Honor's dissertation just now, which is asked of any witness during the course of this trial, either by way of deposition or in open court while the witness is on the stand, shall be deemed to be objected to upon [9] each ground which I have stated here this morning.

And in addition upon the following several, separate and distinct grounds: And when I say "several and distinct" I mean that the objection is not to be considered in the conjunctive, as, for example, when you object to something upon the ground it is incompetent, irrelevant and immaterial, the evidence sought would have to be subject to all three of those grounds. Otherwise, the objection is properly overruled.

So I make the objection, in addition, as follows:

- 1, the evidence is immaterial;
- 2, the evidence is irrelevant;

3, the evidence is incompetent;

4, there is no proper foundation laid;

5, the evidence goes outside of the specific issue with reference to alleged negligence as set forth in the plaintiff's complaint, which refers solely and only to the ventilator shaft in the masthouse No. 2, the allegation being that the defendant negligently "failed and neglected to supply sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work." [10]

* * * * *

Mr. Simpson: There was a stipulation the last time we were in your chambers that Mr. Gallagher proposed that he would want to have a standing objection to the relevancy and materiality of any questions addressed to any witness on the question of practices elsewhere.

And I said I would stipulate that he could have such an objection, without having the necessity of of posing the objection every time a question is asked.

Mr. Gallagher: Well, I want——

The Court: Of course, his objection as to lack of foundation, I suppose, goes to lack of foundation in that the [11] witness would not have had observation of a masthouse aperture of the nature involved in this particular litigation, unless the witness had specifically stated so.

Mr. Gallagher: That, your Honor, is not inclusively correct. My objection with reference to the subject of foundation is the same as my objection with reference to competency, materiality or rele-

vancy, and it is premised in part upon the rule that the conduct of others must have occurred under circumstances substantially similar to those existing in the case at bar.

Now, counsel may not be willing to stipulate, but will your Honor, in lieu of a refusal to stipulate to my standing objection, now make a ruling that the record shall be deemed to physically include immediately after each question asked of any witness during any deposition or during the oral testimony of any witness, to be physically included in an objection which I then make.

The Court: Insofar as it relates to the subject matter you have discussed in chambers.

Mr. Gallagher: Right here this morning.

The Court: Yes. The court will so understand. And I will, on my own motion, then perhaps disallow the particular questions, because I think Mr. Simpson at the last trial did tend to go a little beyond the limits of legal propriety, but, in general, he was to my view within them. [12]

I am sorry the Appellate Court became so interested in its general chastisement that it did not deal with the specific question which was bound to arise again in this case.

Mr. Gallagher: Now, there is another subject which I would like to have your Honor make a ruling on, so it won't be necessary for me to object during the course of examination of a witness before the jury.

During the last trial Mr. Simpson constantly framed questions as follows: "What is the custom

or what is the practice or what have you observed with reference to safety appliances or safety precautions taken on other ships around openings in the deck or around ventilator shafts in mast-houses?"

Now, I would like the same ruling from your Honor with reference to a standing objection on these grounds:

In the first place, when you ask any witness what is the custom or practice, "or do you know of a custom or practice" you are asking the witness for a conclusion.

I recognize that there may be some cases holding that you can ask a conclusion of a witness with reference to custom and practice, but I take the position that the only way in which to prove custom or practice, in the face of an objection, is to establish a series of things actually observed by witnesses, the sum total of which would enable a jury perhaps to find, as a question of fact, there was a [13] custom or there was a practice.

Now, the next vice in that type of question is this: When the question includes the phrase "safety precautions, safety appliances," or "safeguards" and so forth and so on, that permits the witness to express his opinion with reference to the fact that a certain physical thing on the deck of a ship is actually a safety precaution or a safety guard or a safety appliance.

Now, your Honor will recall various instances of that, and I would like to have my objection to questions which contain those phrases upon the grounds

which I have stated now, and request a stipulation from counsel that my objection shall be deemed to be physically included in the record immediately after each such question is asked, without my repeating it, or in lieu thereof, that your Honor now make an order that the objection upon the grounds which I have stated shall be deemed to be physically included in the record immediately after each such question is asked.

The Court: The court being alerted to the fact you are going to make such an objection, unless we have such an order and being aware, well aware of your philosophy on that subject, will make the order without a stipulation.

I think, though, that this area was generally approached with live witnesses at the last trial.

Mr. Gallagher: It was, your Honor. [14]

Mr. Simpson: Yes, it was.

The Court: Is that going to be true here?

Mr. Simpson: Well, we will only have one live witness on any questions in this area.

The Court: I think custom, if you are going to offer evidence of custom, had better be preceded by a foundation which shows acquaintance with the custom and that words of conclusion should be left out of the questions. Let the witness state them, if there are.

Qualify him as an expert or an observer of extensive observation and I will stop you, without Mr. Gallagher's having to object, if I feel you are going beyond what you should.

There is a great deal of merit in the objection

stated, when it is urged as to a particularly possible type of question.

But since this case was tried last time you have tried a great many more cases, Mr. Simpson, and you probably will, with all of that experience, be able to approach this subject, if you approach it at all, with more finesse.

And I have also tried many more cases, many with Mr. Gallagher, in fact, many of which he has won and some of which he has lost, I think.

Haven't you lost a case? I can't think at the moment of your losing any since the Anderson case, your first case, and [15] the Webster case which immediately followed this case.

Mr. Gallagher: Well, I think I have only tried one case before your Honor since then.

The Court: Well, that was the case of the cook who fell into the bait tank.

Mr. Gallagher: Yes. Now, your Honor, I don't know whether I have made myself clear on this question of asking any witness whether he knows of a custom or practice.

Now, that is not a subject of expert testimony.

The Court: No, that is a subject of knowing of a fact. The fact being a custom or practice.

Mr. Gallagher: Then the question assumes there is a custom or practice and permits the witness to express conclusion that there is such a custom or practice, and if you ask the witness, "Do you know of a custom or practice," or "Is there a custom or practice" then you are permitting the witness to decide for himself what constitutes a custom or

practice, and give his answer to that subject, when he is not qualified to do so.

The Court: The court will require more than the conclusion of the witness. The witness will have to state the extent and nature of his observation and experience with respect to the custom or practice, and then the court will determine whether there is enough substantiality claimed by the witness in his answers that we would be [16] warranted in letting him say that there is a custom or practice, always leaving it, of course, to the jury to determine whether the witness was right on that or not.

Mr. Simpson: Your Honor, there are two things I would like to mention here so we don't get into trouble on them.

One is that while we will do our utmost to make the questions as proper in language as we can, I believe I would like to call the court's attention to the fact there is a danger, if we should go amiss and the court finds it is obligated to wage the defendant's case, by making the objections——

The Court: I am not going to wage anybody's case, Mr. Simpson.

Mr. Simpson: My point is if the objections are not made by Mr. Gallagher, but consistently made by the court, in the eyes of the jury it may have a bad appearance. I hope no objections will be necessary. I just want to mention that.

Mr. Gallagher: I don't think the court will make an objection. All the court will do will be to say,

"I sustain the objection which was made in chambers." That is all.

The Court: I think I would say, in light of the conferences we had in chambers, you better proceed——

Mr. Gallagher: Withdraw the question or——

The Court: ——or you had better place it in a different way, and let him go ahead and place it in a different way. [17]

I will not scuttle either of you by pointing out to the jury any suggestion you are trying to do what you shouldn't, unless you stray much further than has been indicated as the area of possible disagreement here.

Mr. Simpson: Secondly, on this area of discussion Mr. Gallagher has been mentioning, I did want to mention that in going into a custom I want to make sure I understand your Honor's thinking on it.

We go into a custom, and the avenue of exploration will be to qualify the individual by virtue of his background being sufficiently competent and familiar with the activity aboard ship or whatever it might be, so that he would be able to answer the questions.

The Court: Yes.

Mr. Simpson: Might I——

The Court: It requires ships of the general character. It requires apertures of the general character and of the general location. And if there isn't a class of ships which is fairly large which

has apertures of this type at this location, then there can't be a custom with regard to them.

Mr. Simpson: Yes.

Mr. Kilpatrick: The court is not suggesting, however, it will be necessary to go into specific instances in which the witness has participated regarding use of safety appliances, are you? [18]

In other words, the witness doesn't have to dig back in his history and say, "On November 3, 1936,——

The Court: That doesn't show a custom. That shows the witness' own experience.

Mr. Kilpatrick: I think that is Mr. Gallagher's point, unless I misunderstand it.

Mr. Gallagher: I covered all those propositions and intended to in my objection. In other words, to give you an example, I have been on hundreds of cargo vessels in my experience and I have seen various and sundry things.

I don't think I could be asked whether there is a custom or practice or whether there is a custom and practice with reference to any particular thing, and if a witness is restricted to giving a series of specific incidents, which the plaintiff contends will, in their cumulative effect, amount to proof of a custom or a practice, then I think the witness is required to give those specific instances and to describe the particular part of the vessel involved, so as to bring it within an area like the one we have involved here.

For example, what difference would it make what a ship owner did in the engine room of a ship?

The Court: Yes, I see your point, Mr. Gallagher. Of course, that would call upon Mr. Simpson making a very prolonged examination, if he has anything of substance on this particular point. [19]

And in that regard, Mr. Simpson, I am not going to rush you in the case. We have all of this week, we have all next week. If necessary, we will intrude on someone and take more time.

If we have to, we will work late hours. You take whatever time is necessary to follow the *modus operandi* of which Mr. Gallagher says would be error for you not to follow.

Mr. Gallagher: What is going to be your Honor's ruling, or what is your present ruling with respect to these questions which include these words, "safety appliances, safety precautions and safeguards" and so forth?

As I understood your Honor's rulings last time, they were predicated upon the premise that you would allow testimony showing that on a certain ship there was a grating over a ventilator shaft or that there were rails up above the top of a ladder.

Now, those things, if they are proper at all, which I do not concede, should be proved merely by having the witness say, "On such and such a ship I saw up above the vertical members of a ladder continuation rails" and not characterize them as safety appliances.

The Court: I think the words "safety appliances" are definitely words of conclusion.

Mr. Gallagher: I do, too.

The Court: Since this particular trial I [20] have had a number of cases in which that question has arisen, and I have seen cases come down from higher courts where the safety appliances are concerned, and the witnesses are not allowed to characterize it as a safety appliance, but they describe its physical characteristics and then the conclusion that is to be drawn is one which may be suggested to the jury in arguments, but must be reached by the jury in deliberation, rather than by either the court saying that such and such a thing is or is not a safety appliance, or a witness saying it is or is not a safety appliance.

Mr. Gallagher: And the other words are the same, "safeguards, safety precautions," and all that similar type of terminology.

The Court: Yes. I think we had finally reached that in the last case, as the latter part of Mr. Wigmore's dissertation commenced to weigh with me equally with the first part, upon which I had relied at the outset of the case, and then later changed the philosophy of rulings.

Mr. Gallagher: Well, now, we get back to this question we had in the deposition.

Mr. Kilpatrick: Before you get back to that question, Mr. Gallagher, may I state what I understand to be the court's position on this matter of custom? And that is, that a witness who will be asked to testify to a custom will first be qualified by showing his general background, his [21] familiarity with types of ships, his familiarity with types of physical structures on ships around holes

in decks, around ladders, around ventilator shafts, in masts, physical structures in masts and so on.

But that it is not necessary to direct the witness to specific instances which may have occurred in his past and which would unnecessarily — which would be unnecessary since the witness will be able to testify to a broad general familiarity with these matters.

The Court: But the witness should testify to the specific things which he has observed.

Mr. Kilpatrick: With all due respect, I believe the weight of the cases is against such a position. It is sufficient for the witness to show that he is familiar generally with structures aboard ships of this type. That there is no necessity for taking——

The Court: He doesn't have to go through a hundred ships and say, "On such and such a day I observed such and such and extended rail and it was so many inches high," and so on, and simply show it by way of numbers.

But if he is going to tell what he saw on a boat he should tell what he saw definitely in the way of physical description of it, instead of legal conclusion of what it amounted to.

Mr. Kilpatrick: You mean the legal conclusion it amounted [22] to a safety appliance?

The Court: Yes. He shouldn't say that. He can testify as to the custom, if he knows there is a custom.

First, he has to show he knows there is, and that would mean either observation of many ships or

suppose the Coast Guard called in people in his position and said, "Now, the customs of the sea are thus and so," and lectured him on them.

I think you can acquire knowledge of a custom that way.

Mr. Gallagher: That would be hearsay, wouldn't it?

The Court: Well, yes, that would be hearsay, but you can ask him how he knows the custom.

Mr. Gallagher: Suppose he says he knows it——

The Court: He can't tell just what they told him. He can say, "I attended lectures on the subject" if that were the case.

Mr. Gallagher: Well, I would object to any questions about what anybody had heard at any lectures or what anybody else had told him, because that certainly would be hearsay and it would be more than hearsay. It *would repetition* of conclusions.

The Court: He will not be permitted to tell what he heard at the lectures. But he has had a sum total of experience. It might, after we hear it, amount to inexperience. But he will have a sum total of something which might amount to experience. That could include lectures. It could [23] include personal observations. It could include a study of the published literature on the subject. And he would be open to cross examination upon it.

Now, he couldn't tell what he read in any particular piece of literature nor could he tell what he heard in any particular lecture, unless that is probed out of him on cross.

But he can say he had access to such literature or lecture, and he can always tell what he saw.

Mr. Gallagher: Well, I don't want the record to be silent. In the face of your Honor's statement, the defendant respectfully disagrees with what your Honor has said with respect to what would be admissible in the testimony of any witness, in an attempt to establish a custom or practice.

And in the event such questions are asked, I respectfully request that the objection of the defendant to each such question shall, by order of your Honor, be deemed physically present in the record at the end of each such question on each of the following grounds, severally and separately and distinctly, and not in the conjunctive:

- 1, the evidence is immaterial;
- 2, the evidence is irrelevant;
- 3, the evidence is incompetent; and
- 4, the evidence calls for a conclusion and opinion of the witness;
- 5, the opinion and conclusion of the witness [24] is predicated upon hearsay statements or matters which he claims to have read;

6. the introduction of such evidence would deprive the defendant of due process in that due process of law, or, in that the defendant would have no opportunity to cross examine the people who may have made statements to the witness upon which the witness bases a conclusion that there was a custom or a practice.

And with reference to books or periodicals, the books and periodicals couldn't be introduced in evi-

dence. Therefore, any conclusions reached by the witness, as a result of reading periodicals or books, would likewise be incompetent and hearsay.

The Court: The court will understand that such an objection is made to every question of the character which you have referred to.

Mr. Simpson: Might we finish this deposition?

Mr. Gallagher: Not yet we haven't finished with it. I don't know whether his Honor has ruled on that one question yet. I think perhaps you——

Mr. Kilpatrick: I think the court ruled on that question, it is proper.

The Court: I will consider I did. I intended to.

Mr. Simpson: I will continue reading then, beginning with page 8. [25]

* * * * *

Mr. Gallagher: And I think, your Honor, I should have also the further ruling, which I will ask your Honor to make: And that is, that after each answer the record shall be deemed to physically contain a motion to strike each answer given by each witness, either by way of deposition or oral testimony along these same general lines that we have been discussing here this morning, upon each ground stated in the objection to the question.

And that the motion to strike shall be considered as to each ground severally and separately and not in the grounds [27] considered together collectively.

The Court: The court will so understand.

Mr. Gallagher: And whenever the court permits an answer to be read, the record will be deemed to show a denial of the motions.

The Court: Yes.

Mr. Gallagher: And likewise, I think we should have a further ruling whenever the court permits an answer to be made, the record shall be deemed to show physically an order overruling the objection.

The Court: Yes. In reading this deposition, I think the objections might be omitted where it doesn't make any contribution to the continuity.

Mr. Gallagher: I don't think the objections should be read in the presence of the jury.

Mr. Simpson: No. Shall I continue, your Honor?

The Court: Yes. Yes, this proceeding was going to take half an hour. It has now taken 40 minutes.

How much longer is it going to take?

Mr. Gallagher: Well, I think, your Honor, with our understandings with reference to objections and motions to strike your Honor can now proceed to settle this deposition without any further assertion of objections or motions to strike, because they are considered to have been made, in any event. [28]

The Court: Where a live witness can't say it is a safety device, a witness by deposition can't say it, either.

Mr. Simpson: I would like the record at least to show, your Honor, that despite the Court's ruling of the deletion of the word "safety," that at least the plaintiff does object to the deletion.

The Court: You object to the deletion.

Mr. Simpson: Yes.

The Court: You are deemed to object to the fact that the court requires you to not use the expression "safety device".

Mr. Simpson: Yes.

The Court: Now, of course, "safety device" might, under some circumstances, be proper. It would be proper if there is a specific statute or an enforceable regulation which enumerates particular safety devices.

Then what is enumerated therein, it has been legally characterized as a safety device.

Mr. Simpson: Yes.

The Court: But in the absence of that this jury must follow, although it is a maritime standard, it is sort of comparable to a common law standard, and I think the basic test is whether the operators of the vessel in question used reasonable care.

Mr. Simpson: From that would I understand that the court could not then properly instruct the jury they are required [29] to provide a reasonably safe place?

The Court: Oh, I will instruct them they are required to use reasonable care to provide a reasonably safe place.

Mr. Gallagher: Will your Honor defer ruling on that until you settle the instructions?

The Court: All right. But that is my present intention. I think that is part of the law. They are required to use reasonable care to provide a reasonably safe place, aren't they?

Mr. Gallagher: There is no allegation in the complaint there was a failure or negligent failure or any failure to provide a reasonably safe place to work. It is tied up irrevocably in the complaint that the defendant failed and neglected to supply

“safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work” and that is different from a general requirement to provide a reasonably safe place to work.

The Court: I think it is apparent from the pleadings they are alleging a negligent failure to provide a reasonably safe place to work, with regard to not having safety appliances at the points of the ship in question, and I am not going to let the trial come down into a holding of either party to the most strict dictionary definition of words. Substantial justice, legal justice is never accomplished by that. [30]

* * * * *

Mr. Gallagher: May I call your Honor’s attention to a particular part of that answer on page 9, which is more than ordinarily vicious. The last words of the answer, “to see that these practices are carried out.”

That certainly——

The Court: That is common.

Mr. Gallagher: That is a conclusion.

The Court: Yes, the giving of a bulletin is not a follow-up on it. I think that part, that particular objection of Mr. Gallagher’s is good.

Mr. Simpson: Then do I understand the court is striking that phrase?

Mr. Gallagher: Yes, “to see that these practices are carried out.”

Mr. Simpson: In lines 12 and 13?

Mr. Gallagher: On page 9 of the Castle deposition.

The Court: To give "bulletins every month to its ships' officers, especially the chief mates."

Everything after that I think should be omitted from the reading, that is, of that answer, "to see that these practices are carried out."

Mr. Simpson: Shall I continue to read at line 14? [31]

The Court: I think Mr. Gallagher said it isn't necessary, in view of the expressions you have stated, that the words "safety device" should not be used or "safety appliance."

* * * * *

Mr. Gallagher: I object to that question specifically upon the ground, and note that there is no occasion for illumination in the absence of proof that a particular place is dark. In other words, a proper foundation would have to be laid showing that the masthouse was in a state of darkness at any time when Mr. Hutchison was required to use it, in the course of his employment.

The Court: Or might properly use it.

Mr. Gallagher: That would be included. Course of employment, I think, is thoroughly understood by all of us; what the courts have said it means. But my particular point here is this: Light is not required unless a place is dark.

And in the absence of proof that a place of work, we will say, is dark, there is no relevancy to any evidence with reference to artificial illumination.

The Court: Well, to require, or, to say that a light is not burning in a place that the evidence shows is lighted is, I think, something that any jury

of reasonable intelligence would be able to appreciate.

Mr. Gallagher: Let me put it this way, your Honor: You go home occasionally in the daytime and your house has windows and has shades, and let's say that the shades are all up in your house.

The physical fact and the physical law demonstrates there is a diffusion of light. We go into your house in the daytime, [33] with the shades up. You don't turn on lights; you don't need them.

My point is this: With reference to this particular masthouse, on this particular ship, the question of permanent lighting fixtures, or the question of temporary lighting fixtures would not be material or relevant, in the absence of proof showing that at any time when Mr. Hutchison was required to be there——

The Court: No, but it doesn't create any harm to show it.

Mr. Gallagher: Well, I think it does. I would like to state my full objection, your Honor.

The Court: I don't think that the witness can say whether it is proper illumination or not. He can state the degree of illumination.

And I suppose, if there is a claim here, Mr. Simpson—and I don't remember—the masthouse was dark, that you are going to have live evidence to show it.

Mr. Simpson: Yes, your Honor.

The Court: Are you going to start out with live evidence.

Mr. Simpson: We are starting—we will take three depositions in a row.

The Court: Can you take the others first?

Mr. Simpson: We can.

The Court: I don't like to ask a jury to come in at [34] 10:15.

According to your prospectus yesterday I could have had them come a quarter of 10:00 and we would have been through with it.

Since we have come in here, it has turned out we have been almost an hour now and we still, on my estimate, have probably half an hour to go.

I would like to defer further proceedings out of the presence of the jury until some later time.

Mr. Simpson: The only problem is in the opening statement to the jury I am placed in an awkward position, without this deposition being settled, in perhaps telling them we will prove something based on the deposition and then if your Honor doesn't permit it to come in Mr. Gallagher will argue——

The Court: All right. How much more of the deposition is there? Do you contend the word "proper" is something that the witness could conclude?

Mr. Simpson: Since it pertains aboard ships in general, rather than to this specific one, so he is not asked to draw a conclusion as to whether there was proper light aboard the Linfield Victory, I would think it might be a proper question.

Mr. Gallagher: In the absence of substantive evidence of darkness in the masthouse at the time they

claim that Mr. Hutchison was in it and at the time they claim he fell into [35] the ventilator trunk, the question of illumination is improper and there is no proper foundation laid.

I can give your Honor a case on that which holds that before you can go into the question of artificial illumination you first have to show it is dark.

The Court: Of course, that would be in light of the presumption that the triers of fact are reasonable men and women. It would be a rule of expediency.

Here we are just taking up a lot of time of useless objection with things that are obvious to any reasonable man.

Mr. Simpson: There are approximately four more pages, your Honor, of the deposition.

The Court: Go through them fast.

Mr. Simpson: Do we have a ruling by your Honor on this last one?

Mr. Gallagher: The question starting on line 11, page 11. That certainly calls for a conclusion.

The Court: I think "proper" is not a word which can legally be used in that question.

I don't know. It has been a long time since I read this deposition. I hadn't been alerted to the necessity of this until you asked for this conference, whether you have laid a foundation as to observation sufficient to establish a knowledge of custom.

I was about to suggest, you don't have to follow the [36] suggestion, but if you do have that foundation that "usually" would be a proper word to use, instead of the one that you have.

Mr. Gallagher: Well, the trouble with that, your Honor, is this: When that question was asked, at the time the deposition was taken, I objected to it as follows:—

The Court: I am aware of your objection, Mr. Gallagher.

Mr. Gallagher: On lines 14 to 17 on page 11. Now, I didn't cross examine this witness with reference to that subject, because I was convinced the objection was good, and that the court wouldn't permit that question as asked to be read to any jury.

The Court: Well, the court will not permit it as asked. If you can get some agreement with Mr. Gallagher, as to a modification and have it stipulated that the witness shall be deemed to have so stated, I will accept that.

But the question as asked is not a lawfully proper question.

Mr. Gallagher: I can't make any agreement with reference to changing it, because I would then have no opportunity to cross examine.

The Court: All right, then. He says he won't agree. Let's not argue. [37]

* * * * *

“Q. Did you examine the masthouse with the hatch door closed?”

“A. The mate——”

Mr. Gallagher: I object to that question upon the ground that it is immaterial, in that there is no evidence proving or tending to prove that the hatch door was closed at any time while Mr. Hutchi-

son was within the masthouse or within the escape shaft in masthouse No. 2.

The Court: Overruled.

Mr. Simpson:

"A. The mate and I closed the hatch door to see just how dark it was in there. It was quite dark, and this was in late forenoon." [41]

The Court: The court deems there is a motion to strike that.

Mr. Gallagher: Yes, your Honor.

The Court: And it is denied.

Mr. Simpson: Next turn to page 19, commencing at line 17.

"Q. Did you note any screen or other protective covering surrounding the ventilating shaft?"

Mr. Gallagher: Now, we have that word "protective" in there, your Honor.

The Court: You can't, in the course of reasonable, careful professional handling of these things avoid all adjectives. I will allow it in this question over your objection.

Mr. Simpson:

"A. There was no screen over the ventilating shaft at all, it was open on the top. There was a broken screen on the bottom, the hold end of it, the lower end."

And that is all we offer of this deposition.

The Court: That is all you are going to read?

Mr. Simpson: Yes.

The Court: All right. Well, the jury has been kept a half-hour. [42]

* * * * *

Mr. Simpson: The first witness for the plaintiff will be Andreas Amundsen, and the testimony will be by way of reading the deposition of Andreas Amundsen.

DEPOSITION OF ANDREAS AMUNDSEN

Deposition of Andreas Amundsen, taken before Leo E. Miller, a Notary Public in and for the City and County of San Francisco, State of California, commencing at 10:45 o'clock a.m., Friday, July 18, 1952, in the Merchants Exchange Building, 465 California Street, San Francisco, California, pursuant to oral stipulation.

* * * * *

“Would you state your name?”

Mr. Kilpatrick: “Andreas Amundsen.”

Mr. Simpson: “Are you married, Mr. Amundsen?”

Mr. Kilpatrick: No.

Mr. Simpson: “And do you expect to take employment on a vessel when the opportunity presents itself again?”

Mr. Kilpatrick: “Well, if I could go back to sea, yes.”

Mr. Simpson: “How long have you been going to sea?”

Mr. Kilpatrick: “22 years.”

Mr. Simpson: “That is your usual occupation, is it, as a sailor?”

Mr. Kilpatrick: “Yes, A.B.”

(Deposition of Andreas Amundsen.)

Mr. Simpson: "Do you remember serving on the Linfield Victory?"

Mr. Kilpatrick: "Yes, sir, I was there almost six months."

Mr. Simpson. "I see. And do you remember knowing a man known as Nathanael Hutchison?"

Mr. Kilpatrick: "Yes, sir."

Mr. Simpson: "And when did you first know this man?"

Mr. Kilpatrick: "Well, Scotty come aboard there, and it was back east, and I never seen him before in my life, but we was working together on board the ship; we get interested, and start joking together."

Mr. Simpson: "You refer to the name of Scotty?"

Mr. Kilpatrick: "I didn't know the first name. I asked him, 'What's your name,' you know. 'They call me Scotty.'"

Mr. Simpson: "I see. That was Nathanael Hutchison's nickname, was it?"

Mr. Kilpatrick: "Yes, sir."

Mr. Simpson: "And you say he joined the ship. Did you mean by that the Linfield Victory?"

Mr. Kilpatrick: "Yes, sir, that's where we were shipmates, you know."

Mr. Simpson: "Now, you said the ship was back east?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Can you be more particular about what port it was when you first met Scotty?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "It was in Baltimore."

Mr. Simpson: "In Baltimore. Now, directing your attention to the port of Baltimore where you say the ship was, Scotty was part of the sailor's gang, was he?" [67]

Mr. Kilpatrick: "Yes, he was the maintenance man."

Mr. Simpson: "The maintenance man, but he did more or less the same work as you did?"

Mr. Kilpatrick: "Oh, yes."

Mr. Simpson: "Now, while you and Scotty were on the ship can you recall any occasion when you were both working in the hold together?"

Mr. Kilpatrick: "Well, you mean when we were down cleaning holds?"

Mr. Simpson: "Yes."

Mr. Kilpatrick: "Well, we started on—well, like every day we were working together."

Mr. Simpson: "I see."

Mr. Kilpatrick: "And—well, I don't know—that special morning we were down there like any other day. The boatswain turned us to at 8:00 o'clock, and we went down there and cleaned holds, and the boatswain come and knocked us off for coffee time."

Mr. Simpson: "Do you remember what hold it was?"

Mr. Kilpatrick: "No. 2."

Mr. Simpson: "And you were down in the hold?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Was Scotty with you?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "Yes, sir."

Mr. Simpson: "From 8:00 o'clock in the morning?" [68]

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Would you continue with your answer? What happened next?"

Mr. Kilpatrick: "Well, then we worked, and so the boatswain come and knocked us off about 10:00 o'clock, 'Come up for coffee.'"

Mr. Simpson: "You say you came up for coffee. How did you come up from the hold?"

Mr. Kilpatrick: "Well, we come up the access ladder there on the mast house."

Mr. Simpson: "Where is that access ladder located with respect to the hold you were working in?"

Mr. Kilpatrick: "It is on the port side."

Mr. Simpson: "You say it is on the port side?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "On the port side of the hold? You are speaking now of the door?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Is it forward or after in the hold?"

Mr. Kilpatrick: "It is in the after part of No. 2 hold."

Mr. Simpson: "And when you came up for coffee time you say you used that access ladder?"

Mr. Kilpatrick: "The same—we come up—yes, sir, we come up the same way as we went down at 8:00 o'clock in the morning, through the access ladder or the mast [69] house ladder."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "Yes, they are all in the same place, is that what you mean to say?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Will you tell us what happened then? You went up for coffee time; did Scotty go with you?"

Mr. Kilpatrick: "Yes, sir, and we walked on the deck together; went in and had coffee; were sitting there talking, you know, joking. Well, it was about fifteen minutes after 10:00 o'clock, we went into Scotty's—what they call a forecandle, you know, his home."

Mr. Simpson: "Did Scotty seem to be in good spirits?"

Mr. Kilpatrick: "Well, he was just like me; and went up for breakfast."

Mr. Simpson: "Continue, and tell us what happened."

Mr. Kilpatrick: "So, we went in Scotty's home and sat down, and we had a smoke. I sit down there and had a smoke. So, he asked me, he said, 'You going to go ashore tonight?' And so—well, he said, 'I got a couple of dollars.' So he took his wallet up and he show me he——"

Mr. Simpson: "Just go on."

Mr. Kilpatrick: "So he show me the money he had in his pocket. It was about, oh, \$25.00 or \$30.00 in this; then he opened up the papers, and he had a hundred-dollar [70] bill in there, and he showed it to me, a brand new hundred-dollar bill, folded up. So, he said, 'Well, Andy, I got money, if you want

(Deposition of Andreas Amundsen.)

to go ashore tonight. You can always pay me back later.' So, well, then, the boatswain come and told us to turn to again."

Excuse me. Is there any one on the jury who cannot hear my voice?

(No response.)

Mr. Simpson: "And while you were with Scotty in his forecastle, and smoking, did you have an opportunity to observe his condition as to sobriety?"

Mr. Kilpatrick: "He was sober, and he was joking, and he was happy."

Mr. Simpson: "And were you sober that morning?"

Mr. Kilpatrick: "Yes, sir. I didn't even go ashore."

Mr. Simpson: "Now, would you tell us what happened after you finished coffee?"

Mr. Kilpatrick: "Well, then the boatswain come and said, 'Well, boys, let's go.' So, we went back the same way, down the shaft alleyway, I call it, you know, aboard the ship."

Mr. Simpson: "You went back the same ladder that you came up?" [71]

Mr. Kilpatrick: "Yes, and we start working again like we did before all morning, same thing, cleaning holds, sweeping and picking up papers, and making a pile over there so when they open up the hatches they take it out and put it on deck.

"So—well, we were working there, so Scotty says, 'Well, I'm going to go up on deck and get a drink.' So, he walked back there where—I saw him walk

(Deposition of Andreas Amundsen.)

up, because I saw him go out the door and walk up the ladder, and so we worked there. So, well, we went up for lunch—to eat dinner. That was about, you know, around 11:00. The boatswain come in and knock you off, so we went up on deck the same way. We walk up the same—you know, up and down all morning. So, we went and washed up and went in the mess hall and eat dinner.”

Mr. Simpson: And did you go back down in the hold to work after dinner?”

Mr. Kilpatrick: “Yes.”

Mr. Simpson: “Was Scotty with you?”

Mr. Kilpatrick: “No.”

Mr. Simpson: “When was the last time that you saw Scotty?”

Mr. Kilpatrick: “Well, that was around 11:00 o’clock, or something like that.” [72]

Mr. Simpson: “That was when he came back down into the hold with you, after coffee time?”

Mr. Kilpatrick: “That was at 10:30.”

Mr. Simpson: “At 10:30, and it was sometime later, but before lunch, that Scotty went back up?”

Mr. Kilpatrick: “Yes.”

Mr. Simpson: “Did you notice what route he took?”

Mr. Kilpatrick: “The same way.”

Mr. Simpson: “Through the door?”

Mr. Kilpatrick: “Yes.”

Mr. Simpson: “And that is the last you saw him?”

Mr. Kilpatrick: “Yes.”

(Deposition of Andreas Amundsen.)

Mr. Simpson: "And did you say anything to him as he left?"

Mr. Kilpatrick: "I can't remember now. I may have said something."

Mr. Simpson: "When did you next see Scotty after this?"

Mr. Kilpatrick: "Well, I may have seen him up in the dining room, I'm not sure."

Mr. Simpson: "I mean, after this—after this day we are talking about, when did you next see Scotty again?"

Mr. Kilpatrick: "You mean after he was dead?"

Mr. Simpson: "Yes."

Mr. Kilpatrick: "That was—that was up in Philadelphia."

Mr. Simpson: "How many days?" [73]

Mr. Kilpatrick: "About five days."

Mr. Simpson: "Where was he when you saw him in Philadelphia?"

Mr. Kilpatrick: "He was in the shaft alley."

Mr. Simpson: "That was in this mast house, was it, that you have been referring to?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And he was at the bottom of something that you referred to as a ventilating shaft, or a shaft alley, is that correct?"

Mr. Kilpatrick: "Yes—not shaft alley, no. I mean ventilator shaft."

Mr. Simpson: Excuse me one second, your Honor. I want to get the photographs that are referred to here that were marked.

(Deposition of Andreas Amundsen.)

"I am showing you a man looking up through a hole, and I will ask you——"

Mr. Gallagher: Excuse me. "I am showing you a photograph".

Mr. Simpson: Thank you. "I am showing you a photograph showing a man looking up through a hole, and I will ask you if you can identify that photograph, what it purports to be. Does that look like the ladder that you used?"

Mr. Kilpatrick: "That is the ladder we were talking [74] about, if this is the mast house number two, yes."

Mr. Simpson: Might we at this time, your Honor, have this, which has been marked for identification, offered in evidence as Plaintiff's 1.

Mr. Gallagher: No objection. Will you stipulate with me that is Mr. George Wise, whose picture shows in that photograph——

Mr. Simpson: So stipulated.

Mr. Gallagher: —your partner and one of the plaintiff's attorneys.

Mr. Simpson: That is correct.

The Court: It is admitted in evidence.

(The document referred to was marked Plaintiff's Exhibit 1 and received in evidence.) [75]

* * * * *

Mr. Simpson: Beginning with the 14th line, then, and continuing with reference to Plaintiff's 1 which has been introduced:

"Did mast house number two look like that on the Linfield Victory?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "Yes." [82]

Mr. Simpson: "And, so far as your memory serves you, that is an accurate reproduction of the top of the ladder at the mast house number two, isn't it?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: May I offer this?

Mr. Gallagher: May I see that one, please?

Mr. Simpson: Yes.

Mr. Gallagher: No objection to the photograph.

The Clerk: Plaintiff's 2.

The Court: Admitted.

(The document referred to was marked Plaintiff's Exhibit 2 and received in evidence.)

Mr. Gallagher: Your Honor, while the jurors are looking at that photograph, I would like to amend my statement.

I have no objection to the photograph, excepting to refer to marks that have been placed on for the purpose of comparison with other vessels and that, of course, is subject to the same objection.

The Court: Well, it will suffice, will it not, if the jury is told to look at a photograph and not any of the markings which have been placed on it?

Mr. Gallagher: Yes, your Honor.

The Court: Disregard the markings on the photograph. Look at the photograph. That is all that is in evidence. The markings are those put there by counsel for their purposes, [83] and it is not in evidence.

(Deposition of Andreas Amundsen.)

Mr. Gallagher: By the witness.

The Court: It doesn't make any difference by whom. They are to disregard the markings.

Mr. Simpson: "Now, you said, I believe that you have been serving on vessels for over twenty-two years?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Have you been on other ships that have access ladders in the mast house?"

Mr. Kilpatrick: "Oh, yes, sure I have."

Mr. Simpson: "Looking at the exhibits which you have identified, and which have been marked as Amundsen A and Amundsen B, I'll ask you if the arrangement of guard rails appears to be the same or different than those on other ships that you have served on?"

Mr. Kilpatrick: "On other ships the bars go right across here."

Mr. Simpson: "Now, when you said, 'right across here,' will you indicate again what you mean by those words?"

Mr. Kilpatrick: "They go out across like this here, not like this."

Mr. Simpson: "The witness is pointing now to the hole on the right hand side of the photograph marked number—marked Amundsen B, which appears to be enclosed by the bars." [84]

Mr. Kilpatrick: "Well, those like this now go right across here; so, in other words, when you want to go down there you had to jump over there."

Mr. Simpson: "I'll give you a pen, Mr. Amund-

(Deposition of Andreas Amundsen.)

sen, and ask you to mark on the exhibit for identification, B, where the bars have been on other ships, as you have testified."

Mr. Kilpatrick: "Right across."

Mr. Simpson: "Right across like that? Now, would you mark each one of those with your initials, those lines that you have drawn?"

"Now, which one of these holes was it that you stated Hutchison was found in?"

Mr. Kilpatrick: "In the forward one."

Mr. Simpson: "You are referring — when you say the forward one, you are referring to the right hand hole in the photograph, Amundsen B?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "For the record, that is——"

Mr. Gallagher: Pardon me, Mr. Simpson. Don't you think you should identify Amundsen B as Plaintiff's Exhibit Number 2 here?

Mr. Simpson: Yes, I think that is very good, Mr. Gallagher. Let the record so show.

"The record, that is the one that is called——"

Mr. Gallagher: Isn't it "For the record"?

Mr. Simpson: Pardon?

Mr. Gallagher: "For the record".

Mr. Simpson: That is what I said.

Mr. Gallagher: Pardon me. I didn't hear the first word.

Mr. Simpson: "For the record, that is the one that is called the ventilator shaft?"

Mr. Kilpatrick: "Yes."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "As differentiated from the one with the ladder?"

Mr. Kilpatrick: "Well, both of them."

Mr. Simpson: "Yes?"

Mr. Kilpatrick: "Both, see. The mast head is inside there, because the ventilator—that is called the ventilator——"

Mr. Simpson: "I'm trying to ask you——"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "He was found in the ventilator shaft, not the one with the ladder, is that it?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "For the sake of clarity, let's mark it. Mark with a large V the ventilator shaft. Just put a V there."

Mr. Kilpatrick: "V?"

Mr. Simpson: "Yes, and then——" [86]

Mr. Kilpatrick: The witness draws on the photograph at that point.

Mr. Simpson: "I see you have drawn what appears to be a W, Mr. Amundsen. I mean a V, as in Victor. W and V are very similar in the Norwegian language.

"Why don't you write in, 'ventilator'?"

"Yes.

"You write it in.

"I'll write 'ventilator' on the side——"

Mr. Gallagher: "On the inside".

Mr. Simpson: "——the inside where the ventilator shaft was. I guess I should have used my ball point.

(Deposition of Andreas Amundsen.)

"Now, that is correct, is it not, Mr. Amundsen, the way it is written now, the ladder on the left and the ventilator to the right?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Was there any ladder in the ventilator?"

Mr. Kilpatrick: "Not to this one, no."

Mr. Simpson: "You started to tell us that the arrangement shown in this photograph was different from the arrangement that you have noticed on other ships that you have served on, correct?"

Mr. Kilpatrick: "Yes. You mean the bars?"

Mr. Simpson: "Yes. You testified that the bars went right across?" [87]

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Now, is there anything else that was different in the arrangement of the Linfield Victory from the arrangement that you are familiar with on other ships?"

Mr. Kilpatrick: "Well, other ships got screens down here, and stuff like that."

Mr. Simpson: "When you say 'down here', where are you pointing?"

Mr. Kilpatrick: "Well, over a hatch. I mean, it is—you know——"

Mr. Simpson: "The witness is pointing——"

Mr. Kilpatrick: "Over the opening."

Mr. Simpson: "You say, 'the opening', you are referring to which opening, the ladder opening or the ventilator opening?"

Mr. Kilpatrick: "Here, the ventilator."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "Have you seen on other ships, in mast houses, a ventilator opening without a ladder going down it?"

Mr. Kilpatrick: "No. This is the first time I ever seen it."

Mr. Simpson: "Now, you have stated that on the ships you have been on the bars go all the way across?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "In the manner that you have drawn them here?" [88]

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And I believe you started to say that to get down you had to do something?"

Mr. Kilpatrick: "Climb over."

Mr. Simpson: "You had to climb over them, is that right?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "What was the method of illumination in this mast house, if you can remember?"

Mr. Kilpatrick: "What do you mean?"

Mr. Simpson: "Do you remember whether there were any artificial lights?"

Mr. Kilpatrick: "No, I don't remember that."

Mr. Simpson: "On the basis of your acquaintanceship with Hutchison how many days was that, roughly?"

Mr. Kilpatrick: "Oh, I can't remember that now."

Mr. Simpson: "You served together on this ship more than one day, did you?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "Oh, yes, yes."

Mr. Simpson: "Well, was there anything about—odd about Hutchison's manner at any time when you knew him?"

Mr. Kilpatrick: "No."

Mr. Simpson: "And when you last saw him, did he appear to be——"

Mr. Kilpatrick: That is "how".

Mr. Simpson: "——how did he appear to be as to [89] sobriety?"

Mr. Kilpatrick: "Fine, fine."

Mr. Simpson: "Fine?"

Mr. Kilpatrick: "Fine."

Mr. Simpson: "Good spirits?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "I believe that's all, Mr. Schal-dach." Now, continuing with cross examination, your Honor.

"How many days had you been working down in the number two or number three hold, prior to the 24th of April?"

Mr. Kilpatrick: "I think that was the first morning we went down there. I mean, 8:00 o'clock in the morning, because we clean up all the holds, but I can't remember if we was there the night before, you know."

Mr. Simpson: "Was the hold open?"

Mr. Kilpatrick: "No."

Mr. Simpson: "Was it covered?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "How much of it was covered?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "Everything."

Mr. Simpson: "All of it was covered?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "I see. So you went down through what they call the escape hatch?" [90]

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Now, the escape hatch on this Linfield Victory goes through the mast house?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And there are two doors, aren't there, on the mast house?"

Mr. Kilpatrick: "There is three or four doors, but the only one that goes down to the—opens up for the—to go down here."

Mr. Simpson: "I see. There are four doors on this mast house?"

Mr. Kilpatrick: "Well, there is one to the lamp locker, and, you know, you put tools in one, and stuff like that."

Mr. Simpson: "All right. In the morning when you went down there to work on the number two—in the number two hold, how many men went down?"

Mr. Kilpatrick: "About four. Four or five."

Mr. Simpson: "Four or five?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And how did you go down?"

Mr. Kilpatrick: "We went down this escape——"

Mr. Simpson: "Escape hatch?"

Mr. Kilpatrick: "Yes."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "And you went in through the midship doors—one of the midship doors?" [91]

Mr. Kilpatrick: "No, that is another door that is on the port side there."

Mr. Simpson: "On the port side?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "In the midship house?"

Mr. Kilpatrick: "Well, number two——"

Mr. Simpson: "Mast house?"

Mr. Kilpatrick: "That's right, number two mast house."

Mr. Simpson: "All right. And you opened the door?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And when you opened the door you saw those bars, didn't you? You saw a stanchion there and these two sets of pipe rails there?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "They are indicated on this picture."

Mr. Kilpatrick: The identification is made as Exhibit B, which is——

Mr. Simpson: Plaintiff's 2.

Mr. Kilpatrick: ——Plaintiff's 2 for this deposition.

Mr. Gallagher: For this trial.

Mr. Kilpatrick: For this trial.

The Court: Is that the picture the jury is looking at now?

Mr. Kilpatrick: It is the one that the jury just completed looking at, your Honor. [92]

(Deposition of Andreas Amundsen.)

Mr. Simpson: Just looked at it.

“And those two pipe rails——”

The Court: Since there is continual reference to objects on that picture, it might be well to keep circulating the picture in the jury box, to keep reasonably abreast of the testimony.

Just pass it from one to the other, so your minds keep refreshed on the subject the witness is testifying about.

Mr. Simpson: “And those two pipe rails and the stanchion were all there at the time?”

Mr. Kilpatrick: “Yes.”

Mr. Simpson: “At the time that you first went down there in the morning?”

Mr. Kilpatrick: “Yes.”

Mr. Simpson: “Will you mark that ‘rails’? Put ‘rails’ right there.”

Mr. Kilpatrick: The witness draws on the photograph.

Mr. Simpson: “All right. Now, those are not movable, are they?”

Mr. Kilpatrick: “No.”

Mr. Simpson: “They are welded right to the side of the vessel, or the bulkhead?”

Mr. Kilpatrick: “Yes.”

Mr. Simpson: “And the stanchion is welded in place?”

Mr. Kilpatrick: “Yes.” [93]

Mr. Simpson: “And how high is that top rail from the level of the floor or the deck?”

Mr. Kilpatrick: “You mean this? (indicating.)”

(Deposition of Andreas Amundsen.)

Mr. Simpson: "Yes."

Mr. Kilpatrick: "I don't know how many feet."

Mr. Simpson: "How high is the stanchion?"

Mr. Kilpatrick: "You mean this stanchion here?"

Mr. Simpson: "Yes."

Mr. Kilpatrick: "I don't know."

Mr. Simpson: "Over three feet in height?"

Mr. Kilpatrick: "Yes, I guess so."

Mr. Simpson: "Do you want to measure his hands?"

"About three feet?"

Mr. Kilpatrick: "Yes."

And "Witness demonstrates with his hands."

Mr. Simpson: "Yes."

Then "And do you know who went down that escape hatch ladder first that morning, when you first went down?"

Mr. Kilpatrick: "No, that I can't remember now."

Mr. Simpson: "You don't recall the order in which you went down?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "But you went down?"

Mr. Kilpatrick: "Yes." [94]

Mr. Simpson: "Hutchison went down?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "The boatswain, Kalnin, went down?"

Mr. Kilpatrick: "Not right then, I don't think."

Mr. Simpson: "Did he come down there?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "Maybe he did, to show us what to do, yes."

Mr. Simpson: "And a couple of other ordinaries, or A.B.'s went down?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And you went down that ladder?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "You got down to the bottom hold and opened the door and came into the hold of the vessel, number two hold?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "All right. Now, did you come up that ladder for coffee?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "All of you come up?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Including Hutchison?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And you made it up all right?"

Mr. Kilpatrick: "Yes." [95]

Mr. Simpson: "Did you have coffee?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "What time was that?"

Mr. Kilpatrick: "10:00 o'clock."

Mr. Simpson: "And then you said you went and had a smoke in Hutchison's quarters?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Then the boatswain turned you to again?"

Mr. Kilpatrick: "Yes."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "And you went back down this same ladder?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And how many of you went down?"

Mr. Kilpatrick: "The same crew, same gang."

Mr. Simpson: "And were those rails that you have marked on that particular exhibit, Exhibit B for identification,——"

Being Plaintiff's 2 in this instance.

"——there present at that time?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And you went down without any incident? Nothing happened on the way down?"

Mr. Kilpatrick: "No."

Mr. Simpson: "You went down and started to work again down there?"

Mr. Kilpatrick: "Yes." [96]

Mr. Simpson: "Then, is it your testimony that Hutchison said he was going to the lavatory to get a drink?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "How long after you came back down there was it that he told you he was going to get a drink?"

Mr. Kilpatrick: "Well, let's see. We come down there, I'd say—I'd say at 10:30, after coffee time, and I'd say, oh—well, 10:00—I mean, 11:00 o'clock."

Mr. Simpson: "About 11:00 o'clock?"

Mr. Kilpatrick: "Yes, something like that."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "And you saw him go through the door in the hold?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "That door leads to this escape hatch?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And that is the last you saw him?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Did you notice whether or not he came back down?"

Mr. Kilpatrick: "No, he didn't come back."

Mr. Simpson: "All right. Did you see him at lunch time or supper time?"

Mr. Kilpatrick: "I'm not sure, because, you know, we all wash in there, you know; hungry, and what have you, you know. You sit down and, you know, start to eat." [97]

Mr. Simpson: "What do you call your noon day meal?"

Mr. Kilpatrick: "Lunch, or——"

Mr. Simpson: "Lunch. All right. What time did you come up the hatch, this escape hatch, for lunch?"

Mr. Kilpatrick: "About 11:30 or 25 minutes to 12:00."

Mr. Simpson: "I see. And is it your recollection, Mr. Amundsen, that you did not, at any time after 11:00 o'clock, see Hutchison?"

Mr. Kilpatrick: "Well, I'm not sure if I saw him for lunch. I wouldn't swear to that."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "You wouldn't swear to that?"

Mr. Kilpatrick: "No."

Mr. Simpson: "Could it be possible that you may have seen him for lunch?"

Mr. Kilpatrick: "Yes, sir, yes, sir."

Mr. Simpson: "I see. What time did you turn to again after lunch?"

Mr. Kilpatrick: "1:00 o'clock."

Mr. Simpson: "And did you all go down again?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Did Hutchison go down?"

Mr. Kilpatrick: "No."

Mr. Simpson: "Did you ask the boatswain or anyone else——"

Mr. Kilpatrick: "Yes, I said I wondered where Scotty was." [98]

Mr. Simpson: "And did you have a conversation with anyone concerning him?"

Mr. Kilpatrick: "No, no."

Mr. Simpson: "At that time?"

Mr. Kilpatrick: "No."

Mr. Simpson: "All you made was a remark, 'I wonder where Scotty is?' "

Mr. Kilpatrick: "Yes."

Mr. Simpson: "You don't recall any remarks being made by any of the members of the gang down there?"

Mr. Kilpatrick: "No."

Mr. Simpson: "Do you recall, Mr. Amundsen, any remarks being made that Scotty had had a hangover and maybe wasn't feeling well?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "No."

Mr. Simpson: "You don't recall that?"

Mr. Kilpatrick: "No."

Mr. Simpson: "Didn't Scotty tell you, around coffee time, when you were in his quarters there, that he had a hangover, and that he had been out the night before?"

Mr. Kilpatrick: "No. He said he had been out, but he didn't say he was sick."

Mr. Simpson: "No, he didn't say anything about hangover."

Mr. Kilpatrick: Excuse me. That is my answer continued. [99] If I may go back and read it over.

"No. He said he had been out, but he didn't say he was sick.

"No, he didn't say anything about hangover."

Mr. Simpson: "Didn't say anything about a hangover?"

Mr. Kilpatrick: "No."

Mr. Simpson: "You stated that in these particular escape hatches there are sometimes rails, which you have designated as, 'A.A.' in this picture?"

Mr. Kilpatrick: "The same as this; those bars go right across."

Mr. Simpson: "In other words——

"The witness is pointing now to the bars which have been previously drawn in, with the lines leading to the word 'rail.'

"In other words, these lines that you have drawn in indicating bars——"

Mr. Kilpatrick: "Yes."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "——they would bar your entrance to the ladder?"

Mr. Kilpatrick: "That's what I say. We had to climb over on other ships."

Mr. Simpson: "All right. Do you recall, or do you know when Scotty was found?"

Mr. Kilpatrick: "Not exactly." [100]

Mr. Simpson: "How many days after the day you last saw him was it?"

Mr. Kilpatrick: "I think it was four or five days."

Mr. Simpson: "Did you go over to where they found him?"

Mr. Kilpatrick: "I went and took a look, yes."

Mr. Simpson: "And where did you look?"

Mr. Kilpatrick: "Down here, where they found him."

Mr. Simpson: "Down here, and you are referring to the ventilator shaft?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "You are not referring to the——"

Mr. Kilpatrick: "No."

Mr. Simpson: "——escape hatch?"

Mr. Kilpatrick: "No."

Mr. Simpson: "Or the hatch—or the opening where the ladder is?"

Mr. Kilpatrick: "No, no."

Mr. Simpson: "He was down at the bottom of the ventilator shaft?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Now, that ventilator shaft there,

(Deposition of Andreas Amundsen.)

that brings up the air, or allows cold air to get down in the hold, is that right?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And there is a ventilator up on top of [101] the mast house, isn't there?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "But he was not—there was no ladder down in the ventilator shaft, was there?"

Mr. Kilpatrick: "No, but—I mean, there wasn't in this one."

Mr. Simpson: "There wasn't in this particular one, aboard the Linfield Victory?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "That's what I am referring to. Now, you have never seen any cover or opening—a cover over the opening of the ventilator shaft, have you?"

Mr. Kilpatrick: "Not on that ship, no."

Mr. Simpson: "Have you ever been on vessels, Mr. Amundsen, where there is a lack or absence of these particular rails guarding the ventilator shaft?"

Mr. Kilpatrick: "No, no, that's what I'm saying. On all the ships I have been on they have bars across there. (Indicating.)"

Mr. Simpson: "I am not asking you about bars across the ladder shaft; I am asking you about bars across the ventilator shaft. Have you ever been on any vessels where they don't have these?"

Mr. Kilpatrick: "(Indicating.)"

Mr. Simpson: "(Indicating.)" [102]

Mr. Kilpatrick: "No, no."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "There are always bars guarding the ventilator shaft?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Just like they are in this particular picture here, Exhibit B?" Plaintiff's 2.

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And are they all about the same height, that is, the stanchion?"

Mr. Kilpatrick: "Yes, yes."

Mr. Simpson: "Do you know what is at the bottom of the ventilator shaft? Do you know what is at the bottom of the ventilator shaft?"

Mr. Kilpatrick: "Yes, there is a screen."

Mr. Simpson: "A screen, and that allows the air to come up or go down?"

Mr. Kilpatrick: "In the hold, yes."

Mr. Simpson: "You say that Scotty had some money with him when you were talking to him in his quarters there just after coffee time?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Did you ascertain or find out whether he had that money on him after his body was found?"

Mr. Kilpatrick: "No. He asked me if I was going to go ashore——" [103]

Mr. Simpson: "After his body was found some four or five days later——"

Mr. Kilpatrick: "Yes, I told the mate and the boatswain."

Mr. Simpson: "Did they find the money on him?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "Yes."

Mr. Simpson: That concludes the testimony in deposition form of Mr. Amundsen.

Mr. Kilpatrick: May we have just a moment, your Honor?

The Court: Yes.

Mr. Simpson: Your Honor, before proceeding to the next deposition which is that of Ernest Kalnin, might I ask the court, having instructed the jury previously to disregard the markings on the photograph which was offered as Plaintiff's Exhibit 2, before any testimony regarding those markings was introduced, that they might now consider the markings on that particular photograph along with the photograph, which are in evidence, for their enlightenment.

The Court: The markings being those referred to in the testimony?

Mr. Simpson: Yes, your Honor.

The Court: All right. The markings are now in evidence.

Mr. Simpson: The next witness for the plaintiff is Ernest Kalnin, whose testimony will also have to be presented by way of deposition.

Mr. Kilpatrick: Is there any reason why we can't follow [104] the same procedure?

Mr. Gallagher: No.

The Court: I hope the jury is clear about it, that at first we admitted that photograph without any markings. Then, as the witness testified con-

cerning the markings, a motion was made to have the markings made part of the evidence, so they might be considered.

You will consider them as markings that were made by the witness who testified, and whose testimony was read here by the attorney who is standing in for him, as the witness was absent and we were using the deposition. [105]

* * * * *

Mr. Gallagher: Your Honor please, Mr. Simpson and I have agreed for clarification of this photograph that the lines which the witness put on this photograph, to indicate the presence of bars on some other vessels that he had worked on, or some other vessel, are these lines from the stanchion over to the bulkhead, identified as AA, and the one directly below it also going to the bulkhead, and identified with the letters AA, and that the other lines are merely to indicate the rails that he was talking about that were surrounding the ventilator shaft.

Is that correct?

Mr. Simpson: That is correct.

The Court: And respecting what exhibit are you talking about? [106]

Mr. Gallagher: That is Plaintiff's Exhibit 2.

Mr. Kilpatrick: I wonder if I might ask the court whether any member of the jury is in doubt as to any portion of the deposition that was read with reference to the two pictures of the doorway.

A Juror: What I would like to know is where is the door?

Mr. Gallagher: There is another photograph, and you will see that.

The Court: The doorways are not depicted on this picture then?

Mr. Gallagher: May we have that photogarph to put in now, the one that shows the picture taken from the outside of the masthouse, looking in? That shows the door.

The Court: Yes.

A Juror: Are the hatch and the ventilator shaft always together like that?

The Court: That I cannot answer. The attorneys should develop that. Of course, they have to go at it by one witness at a time, and it is rather difficult when the witnesses are questioned at some remote place, usually by corresponding attorneys.

But I think they will get all of that detail of construction before you in the course of the trial.

Mr. Gallagher: There is Plaintiff's Exhibit 3, and I [107] think if we had the other one, which was taken closer to the door showing the inside—that is this one (indicating).

This one shows the door (indicating). This is Plaintiff's Exhibit 3.

(The photograph referred to was marked Plaintiff's Exhibit 3 for identification.)

Mr. Simpson: In the interest of conserving time, we might take all of the photographs which will be introduced from Kalnin's deposition and offer them now, if counsel will stipulate, and put them on the board, so they can be examined.

Mr. Gallagher: That is all right.

A Juror: According to those pictures, where is the door?

Mr. Gallagher: I was just going to say, I think Mr. Simpson will agree with me, that Plaintiff's Exhibit Number 3, which is now being examined, will show you where the door is to the masthouse with reference to both Plaintiff's Exhibit Number 1 and Plaintiff's Exhibit Number 2, and we will have other photographs here showing more views, so that there will be no question about it.

The Juror: Thank you.

Mr. Simpson: Your Honor, Mr. Gallagher has offered to stipulate these pictures might be offered into evidence at this time, the first one to be indicated as Plaintiff's next in order, which would be Plaintiff's 4, and that they shall follow in sequence as they appear. [108]

The Court: All right.

Mr. Gallagher: May we also stipulate all of these pictures were taken at the same time that Plaintiff's Exhibit Number 1 was taken up in Portland, Oregon?

Mr. Simpson: So stipulated.

The Court: They are admitted into evidence.

(The photographs referred to were marked Plaintiff's Exhibits 3 to 11, inclusive, and received in evidence.)

Mr. Gallagher: And they are all photographs of the Linfield Victory.

Mr. Simpson: Of the Linfield Victory.

Mr. Kilpatrick: Does that clear up in everyone's

mind the relationship between the shafts and the doors?

A Juror: The second door——

Mr. Kilpatrick: We will have another picture that will show that.

Mr. Gallagher: Only one door that goes into that. Plaintiff's Exhibit 3 shows the door into the masthouse, through which the men went in order to go to work, by going down the escape hatch; the shaft with a ladder, that is correct.

Mr. Kilpatrick: That is correct.

The Court: Will you please all bear in mind it is very difficult for a reporter, who has her back to you, to get what you are saying unless you speak out in a good clear voice. [109]

Mr. Gallagher: Have I corrected mine, your Honor?

The Court: I think you have.

Mr. Gallagher: All right.

The Court: The reporter, at least, is not indicating need of any fidelity at the moment.

Mr. Simpson: For the record, I am placing these in order, having already put up Plaintiff's 1, 2 and 3.

This is Plaintiff's 4 (indicating). Plaintiff's 5.

Mr. Gallagher: Mr. Simpson, can we stipulate, in view of the fact there may not be enough of the structure shown on Plaintiff's Exhibit 5, to show what it is, that is, the door to the port side of masthouse number two, when the door is closed.

Mr. Simpson: So stipulated.

Mr. Gallagher: In other words, it is the same

door that shows in Plaintiff's Exhibit 3, at which time it is open.

Mr. Simpson: So stipulated. The Plaintiff's 4 is the gear locker referred to in the Amundsen deposition, located on the starboard side.

Mr. Gallagher: It is a locker. I will stipulate with you that material—whatever is shown in there—and other things that may have been described in the deposition were customarily stored in that locker. Is that satisfactory?

Mr. Simpson: That is satisfactory. Plaintiff's 6 is the overhead screen referred to in the Amundsen deposition. [110]

Mr. Gallagher: Isn't that in Kalnin's?

Mr. Simpson: Amundsen.

Mr. Gallagher: Kalnin. In other words, when Mr. Kalnin's deposition is read he will refer to an overhead screen.

I think you refer to it as a fire screen.

Mr. Kilpatrick: May we stipulate, counsel, what this is, is up at the roof of this—

Mr. Gallagher: That is right. It is the roof of the part of the masthouse where this ventilator shaft and this escape shaft are shown in Plaintiff's Exhibit Number 1.

Mr. Simpson: Next, Plaintiff's 7, which is a picture of the main deck of the Linfield Victory, looking forward, showing the masthouse, which has been referred to thus far in testimony, and showing the doors regarding concerning that particular masthouse as closed.

Mr. Gallagher: May we also stipulate this photo-

graph shows hatch number three completely covered and hatch number two completely covered, and that this particular device here that looks like an old fashioned brass horn, a big one, is the ventilator up on top of the masthouse, that Mr. Amundsen referred to.

In other words, it is a ventilator cowl.

Mr. Simpson: On both the port and starboard side.

Mr. Gallagher: Yes. Is that stipulated?

Mr. Simpson: So stipulated. [111]

The Court: Maybe you can agree on a definition of port and starboard for the jury, who, I think, are entirely land people.

Mr. Gallagher: I think they know that, but if there is any doubt, port is to the left and starboard is to the right as you stand on a vessel and look from aft toward the forward part of it.

Mr. Simpson: So stipulated.

Mr. Gallagher: So stipulated.

Mr. Simpson: Next is Plaintiff's Number 8, which is exactly the same as Plaintiff's Number 7, excepting that it shows the doors to the masthouse open.

Mr. Gallagher: And may we stipulate, in view of these photographs, Mr. Simpson, that there are only three doors in the number two masthouse, one on the starboard side and two on the port side?

Mr. Simpson: So stipulated.

Mr. Gallagher: The reason I asked you that is that Mr. Amundsen said, "I think there were four doors."

Mr. Simpson: Plaintiff's Number 9 shows the escape hatch referred to in the Amundsen deposition, going down to the hold, where the men had been working and the ladder he testified they had used.

Mr. Gallagher: May it be stipulated that escape shaft is the same one in which Mr. George Wise is standing on part of [112] that escape hatch ladder in Plaintiff's Exhibit Number 1?

Mr. Simpson: So stipulated. Plaintiff's Number 10 is the ventilator shaft which has been testified to in the Amundsen deposition, looking down to the screen where Amundsen testified that the body of Nathanael Patrick Hutchison was found. So stipulated?

Mr. Gallagher: So stipulated.

Mr. Simpson: And Plaintiff's 11 is a picture showing the entire Linfield Victory.

Mr. Gallagher: As much of it as you can get in a side view.

Mr. Simpson: So stipulated.

Mr. Gallagher: Yes.

* * * * *

Mr. Simpson: Your Honor, may the record show we are commencing to read this deposition of Ernest Kalnin, on page 2, at line 6. [113]

DEPOSITION OF ERNEST KALNIN

Deposition of Ernest Kalnin, taken before Roy Chapin, a Notary Public in and for the County of Los Angeles, State of California, commencing at 2:00 o'clock, Saturday, May 17, 1952, in Suite 720

(Deposition of Ernest Kalnin.)

Rowan Building, Los Angeles, California, pursuant to annexed stipulation.

* * * * *

“Would you state your full name, Mr. Kalnin?”

Mr. Kilpatrick: “Ernest Kalnin.”

Mr. Simpson: “Where do you live, Mr. Kalnin?”

Mr. Kilpatrick: “4720 West 153rd Place.”

Mr. Simpson: “What city is that?”

Mr. Kilpatrick: “That is Lawndale, I guess.”

Mr. Simpson: “That is correct. What is your occupation?”

Mr. Kilpatrick: “I sail as a seaman, watchman, boatswain.”

Mr. Gallagher: Not watchman. That should be winchman, shouldn't it, Mr. Simpson?

Mr. Simpson: I believe that is correct.

Mr. Gallagher: Shall we stipulate to change that word “watchman” to “winchman”?

Mr. Simpson: To “winchman”.

Mr. Gallagher: The answer then reads, “I sail as seaman, winchman, boatswain.”

Mr. Simpson: “For how long have you been in this occupation?”

Mr. Kilpatrick: “Oh, roughly, 20 years.”

Mr. Simpson: “What kind of ships have you been on during this time?”

Mr. Kilpatrick: “Well, practically every type made, passenger ships down to schooners.”

Mr. Simpson: “Have you had occasion to [114] be on a Victory ship?”

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "Yes. I was on several Victory ships."

Mr. Simpson: "Do you recall the names of those Victory ships?"

Mr. Kilpatrick: "One was the Linfield Victory, and Hannibal Victory—Oh, right offhand I couldn't give you a list of all, they change so often."

Mr. Simpson: "Directing your attention to the day of April 24, 1951, do you recall what ship you were on at that time?"

Mr. Kilpatrick: "I was on the Linfield at that time."

Mr. Simpson: "What was your capacity on that ship?"

Mr. Kilpatrick: "I was sailing boatswain."

Mr. Simpson: "Did you at that time know the deceased in this particular case, Nathanael Patrick Hutchison?"

Mr. Kilpatrick: "Yes. He shipped in New York as a.b., maintenance."

Mr. Gallagher: Pardon me. Technically, may we stipulate that the letters "a.b." mean able bodied seaman?

Mr. Simpson: So stipulated.

"Do you recall the particular day I have referred to, and any of the events of that day?"

Mr. Kilpatrick: "That day I believe we were in Baltimore, cleaning holds."

Mr. Simpson: "Now, do you recall any [115] particular holds that you might have been in?"

Mr. Kilpatrick: "Number three hold."

(Deposition of Ernest Kalnin.)

Mr. Simpson: "When you were cleaning—could you be more specific?"

Mr. Kilpatrick: "Help pick up the dirt and sweep up the hatch or the cargo, new cargo."

Mr. Simpson: "Would you tell us whom you referred to when you used the word 'we'?"

Mr. Kilpatrick: "There is no such thing as one man going down a hold."

"There was Hutchison and four other sailors and myself down in that hold."

Mr. Simpson: "What did you do with reference to this group?"

Mr. Kilpatrick: "I told them what to do and laid out the work."

* * * * * [116]

Mr. Gallagher: Will your Honor do this: It may be I would want to call Mr. Wise as a witness. He is in the courtroom, so I therefore would ask your Honor to instruct him to either remain or be available. I don't want him to stay here, if he has work to do in his office, but if he will come on telephone call, that is sufficient for my purposes.

The Court: You intend to use him during the presentation of the defense?

Mr. Gallagher: I may. [128]

* * * * *

GEORGE E. WISE

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your full name, sir?

The Witness: George E. Wise.

Direct Examination

Q. (By Mr. Simpson): Mr. Wise, are you an attorney at law? A. Yes, I am.

Q. Where are your offices located?

A. In the Ocean Center Building in Long Beach.

Q. Are you one of the attorneys of record in the case at bar? A. Yes, that is correct.

Q. Directing your attention to the day of May 10, 1951, did you have occasion to arrange for the taking of some pictures with respect to the ship SS Linfield Victory?

A. I believe it was in the year 1952, rather than 1951. [130] Sometime in May of that year.

Q. And would you state the circumstances under which those arrangements were made?

A. I believe it was arranged with Mr. Gallagher's office that I might go aboard the Linfield Victory in Portland. The ship at that time was out of commission, as I recollect, or, at least, not being used, and it was docked up in Portland.

And I made arrangements to go up there and had Mr. Gallagher pave the way for my getting

(Testimony of George E. Wise.)

aboard the ship. He made arrangements to have a ship surveyor himself there, and we had a ship surveyor and a photographer, and all of us went aboard at the same time.

Q. I will ask you to step down now, if you would, and look at the Plaintiff's Exhibits appearing on the board here, and direct your attention in particular to Plaintiff's Exhibit Number 1, and ask you if you recognize that picture.

A. Yes, I do.

Q. Is that a picture of you? A. Yes.

Q. And do you recognize the other exhibits, Plaintiff's 1 through 11, as pictures arranged for by you? A. Yes, that is correct.

Q. And who was present when those pictures were taken?

A. A surveyor whom we had there by the name of Mr. Haines, and another surveyor that was there on behalf of the [131] defendants, and the photographer whose name—it was a firm, of Ackroyd, or something like that.

Q. Mr. Ackroyd?

A. And then there was a caretaker aboard the ship, a man, so there would be the two surveyors and the photographer and myself.

Q. Can you tell me how Mr. Ackroyd took these pictures, with what equipment?

A. He had a camera. I don't know anything about cameras. He had a camera and he had a light, bright light, and his own equipment, carried his own equipment.

(Testimony of George E. Wise.)

Q. Now, were you present when all these pictures were taken?

A. Yes, except I recall looking at these—I wasn't present when the two were taken from the inside of the masthouse. I asked Mr. Ackroyd to take a picture of the ceiling and a picture of the door from the inside, and we all came out.

Q. Directing your attention to Plaintiff's Number 3, which shows the door open, will you tell me how that picture was taken?

A. Well, Mr. Ackroyd had his floodlight run on a ladder, which was inside of the masthouse, and he took it from the outside standing—I believe there is—that would be—he was standing on something; I remember he had some difficulty [132] getting up on something. He took it slanting down from outside, and this one——

Q. And again directing your attention to Plaintiff's 1, which is this particular picture, I ask you what, if any, light was used by the photographer for the purpose of taking that picture.

A. That would be the same floodlight.

Mr. Simpson: No further questions. You may cross examine.

Cross Examination

Q. (By Mr. Gallagher): Mr. Wise, at the time Plaintiff's Exhibit Number 3 was taken, where were you?

A. Plaintiff's 11 you are indicating.

Q. Plaintiff's 3.

(Testimony of George E. Wise.)

A. This says "Plaintiff's 11" up here (indicating).

Q. Disregarding that, it has been marked Plaintiff's 3. Where were you?

A. I was standing outside of the door with the other gentlemen. We were all out here in this deck portion (indicating).

Q. Now, you say that there was a floodlight inside at that time? A. Yes, sir.

Q. Did you stand outside of that door, Mr. Wise, [133] before any floodlight was in there and before any artificial illumination was in there and look inside the masthouse? A. Yes, I am sure I did.

Q. This was in broad daylight, wasn't it, Mr. Wise? A. Yes, that is correct.

Q. When the door was open, as it shows in Plaintiff's Exhibit Number 3, and you were standing outside, how close to the door were you?

A. Well, I can't tell you in terms of feet, Mr. Gallagher. We came up—we knew which masthouse we were going to look in——

Q. I am not interested in that.

A. I am just trying——

Q. Can you tell us how close you got to the masthouse door without any light, any artificial light inside at all?

A. Well, I may have been the one who opened the door, if I had gotten that close, or, at least, I would have been with the other gentlemen.

Q. Did you see the door opened? A. Yes.

Q. You watched it being opened?

(Testimony of George E. Wise.)

A. Yes, I either opened it myself or one of the other gentlemen did.

Q. When you opened the door, did you look inside the masthouse? [134] A. Yes.

Q. And when you looked inside, what did you see? A. Well,—

Q. Just point out on either Plaintiff's Exhibit 2 or Plaintiff's Exhibit 3 what was visible to you with the light that came through that door open in broad daylight, without any other kind of light inside that masthouse whatsoever.

A. I think it would be like looking into a closet with the door open. You could make out the fact there were things in there, probably make out the rough outline of things, these things.

It would be looking from the outside light into a dark area. You see the——

Q. Mr. Wise, is it your testimony, as a fact in this case, that with the masthouse door open and standing outside on the deck in broad daylight, that you could not see clearly these pipe railings and the fact that there were two openings in the deck and the fact that there was a ladder going down the escape hatch?

A. I could see there were these things in there, Mr. Gallagher, but whether——

Q. That isn't the question.

A. Not clearly, not like you can see it here with the—as I say, it is like looking from the outside into a closet. You will see what is in there gen-

(Testimony of George E. Wise.)

erally, but you won't see it [135] clearly, as if you have a light on it.

Q. It is your testimony, Mr. Wise, that a door which is not inside of a room, now, and you are not going into a closet, you are going from broad daylight through a door which has the natural diffusion of light, you recognize that, don't you?

A. Yes.

Q. Is it your testimony under oath, Mr. Wise, that standing out here you were unable to see clearly these pipe railings, the stanchion and the fact there was a ladder in that escape hatch?

Will you please answer that yes or no?

A. I can't answer it yes or no, because I don't know what you mean by the word "clearly". If it is as clear as this, no (indicating).

I think I have said you can see—I could see these items in here, but not clearly (indicating).

Q. Well, were you able to see that there were pipe railings around an opening in the deck, to wit, this ventilator shaft?

A. Yes, I think you could see the pipe railings.

Q. You did see the pipe railings before you went in there, didn't you?

A. I think I did but I am not sure just whether I did or not. I think I did, Mr. Gallagher. [136]

Q. Your best recollection——

A. My best recollection would be that, as I say, not clearly as you would see them here, but you could see them; could make them out.

Q. Well, there was no difficulty about your eye

(Testimony of George E. Wise.)

sight telling you, before you walked in, and without any light, just from the light that came from broad daylight through this wide open door, that there were pipe railings around the ventilator shaft, isn't that correct?

A. No. I could see those.

Q. When you say "no" you mean it is correct, don't you?

A. Well, what was your question again?

Mr. Gallagher: Will you read it to him, please?

(The question was read.)

The Witness: I think I would say I had no difficulty in making out that there were railings there, yes.

Q. (By Mr. Gallagher): And standing outside and before you walked in the masthouse at all, without any artificial illumination inside, you were able to see there were two shafts inside of that masthouse, weren't you?

A. I would say no. If I were looking in there I could see that there was something on the deck. But—I mean if there were shafts or what they were, and so far as the ladder, I don't recall seeing those from the outside. I remember we looked specifically for those when we got in. [137]

Q. I am not asking you what you specifically remember. I am asking you, Mr. Wise, if you testify, as a fact, here under oath before this jury, that standing outside the masthouse, close up to the door, with the door wide open, you could not

(Testimony of George E. Wise.)

see that there were two shafts in that masthouse, two openings in the deck?

A. Well, I don't remember looking specifically to see whether there were two openings or a ladder, or anything like that. I don't have any recollection of seeing them prior to the time we started looking for them when we went inside.

Q. That isn't the question I asked you.

A. My testimony is I don't recall looking specifically, so I obviously can't remember, because—I mean I just don't remember seeing them.

Q. Mr. Wise, you studied physics in high school, didn't you? A. Yes.

Q. You learned about the diffusion of light, didn't you? A. Yes, I think so.

Q. And when you walk up to a house——

Mr. Simpson: Your Honor, I feel I must object to this interrogation regarding physics and diffusion of light as being quite irrelevant to any of the direct testimony given by Mr. Wise, and it is improper cross-examination. [138]

The Court: Overruled.

Mr. Gallagher: Will you read that last question to Mr. Wise?

(The record was read.)

The Witness: I say I probably studied about diffusion of light, but so far as having any knowledge about the physics of it, I am sure I don't.

Q. (By Mr. Gallagher): Mr. Wise, when you stood outside of the masthouse on the deck here (in-

(Testimony of George E. Wise.)

sight telling you, before you walked in, and without any light, just from the light that came from broad daylight through this wide open door, that there were pipe railings around the ventilator shaft, isn't that correct?

A. No. I could see those.

Q. When you say "no" you mean it is correct, don't you?

A. Well, what was your question again?

Mr. Gallagher: Will you read it to him, please?

(The question was read.)

The Witness: I think I would say I had no difficulty in making out that there were railings there, yes.

Q. (By Mr. Gallagher): And standing outside and before you walked in the masthouse at all, without any artificial illumination inside, you were able to see there were two shafts inside of that masthouse, weren't you?

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(Testimony of George E. Wise.)

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The Court: Overruled.

Mr. Gallagher: Will you read that last question to Mr. Wise?

(The record was read.)

The Witness: I say I probably studied about diffusion of light, but so far as having any knowledge about the physics of it, I am sure I don't.

Q. (By Mr. Gallagher): Mr. Wise, when you stood outside of the masthouse on the deck here (in-

(Testimony of George E. Wise.)

dicating), there was nothing to prevent whatever light could get through that door in broad daylight, preventing whatever light there was to get into the masthouse, is that right? A. That is right.

Q. So whatever amount of natural light in broad daylight would go through this masthouse door, when it was opened, was inside the mast house when you stood out there and looked in, isn't that true?

A. Yes.

Q. Now, I want to ask you again: Is it your positive testimony that there was not enough light in broad daylight, going through that doorway, wide open, to enable you to see two openings in the deck of that masthouse?

Please answer that yes or no.

A. No.

Q. You could not see it? [139]

A. That is not what I said. I say it is not my positive testimony. In other words, what I said was I don't recollect looking at these shafts.

I recollect opening a door—or being there when the door was opened, and observing generally pipe railings in there. Not clearly, like here, but you could make them out.

I don't have any recollection of seeing the shafts before we actually looked for them.

Q. Did you look at the floor of the masthouse before you walked in, for the purpose of ascertaining whether there was enough light in broad daylight, with that door open, to enable a person with

(Testimony of George E. Wise.)

normal eye sight to see and recognize openings in the deck of that masthouse?

A. I think I checked around—probably not then—the part you are talking about, but later I was looking generally for any lights or any lighting conditions, generally, yes.

Q. I am just not talking about artificial illumination, Mr. Wise. Let's stick to the question.

A. The question?

Q. Eliminating everything excepting the natural lights, which was present there all around that masthouse on the day you were there in broad daylight, with the door of that masthouse open, standing there at the door, could you, with your degree of visibility, see with just that light openings [140] in the deck of the masthouse? Yes or no.

A. We later——

Q. Just answer it yes or no.

The Court: You may answer yes or no, but then you are entitled to explain.

The Witness: Could I have the question?

(The question was read.)

The Witness: I think my answer would be yes, Mr. Gallagher.

* * * * *

Q. (By Mr. Gallagher): Mr. Wise, how far was it from the coaming here, that is, the doorway into the masthouse, to the stanchion which was at the corner of the guard rails around the ventilator shafts? Was it about three feet, or three and a half feet?

(Testimony of George E. Wise.)

A. I think that—I think that three feet would be about right, Mr. Gallagher. We have the figures on it, and I think your man has, also, which would show that.

Mr. Gallagher: Perhaps there is an exhibit here which would show that.

Mr. Simpson: With Mr. Gallagher's consent on those figures, your Honor, we do have a drawing which was introduced, marked, rather, that we would like to offer at this time, which might help on that. [143]

Mr. Gallagher: Which is the doorway? Here is the doorway opening (indicating).

The Witness: Thirty inches from here to here (indicating).

Mr. Gallagher: A few inches——

Mr. Simpson: Do you want to stipulate to that?

Mr. Gallagher: Yes.

Mr. Simpson: May that be offered, then, as Plaintiff's 12, your Honor.

The Court: There is no foundation for it, but if Mr. Gallagher stipulates we will receive it.

If not, you will have permission to present a foundation.

Mr. Gallagher: Yes, that is all right, your Honor. That may be received as Plaintiff's 12, with the stipulation that those are the measurements taken by your surveyor, Mr. Haines, at Portland, at the same time that Mr. Wise was there. Is that correct?

The Court: Admitted.

(Testimony of George E. Wise.)

(The document referred to was marked Plaintiff's Exhibit 12 and received in evidence.)

Mr. Simpson: I don't know that Mr. Haines was there at that time for the drawing.

Was he?

The Witness: Yes. It was either Mr. Haines or your surveyor, I don't know which. [144]

Q. (By Mr. Gallagher): It says "Haines" down here, Walter O. Haines. A. Yes.

Q. According to this diagram, which is in evidence, the distance from the door to the pipe railings—here it is—the distance from the door is approximately thirty inches, plus three or four more on each end, or about thirty-six inches. Isn't that right? A. That is correct, yes.

Q. So that a person standing here, right up against the opening of the door, and who was going to lift his foot over that door sill or door coaming, to go in, would be looking, not over forty inches inside, to the point where the stanchion at the corner of the pipe rails was located, isn't that correct?

A. That is right.

Q. Before you went in you could see these pipe rails and that stanchion was there?

A. Yes, generally what you see here, but not as clearly.

Q. Not as clearly as this?

A. Yes, that is right.

Q. But you could see generally everything that shows in that photograph?

(Testimony of George E. Wise.)

A. I doubt that you could see a ladder here (indicating), for example. [145]

Q. Do you remember that you were not able to see the ladder, Mr. Wise, and is it your testimony under oath that standing outside you could not see the ladder?

A. All I can say in that is that I don't recall seeing the ladder when I looked in.

Q. Is it your testimony that there wasn't sufficient visibility to enable you to see the ladder, the top of the ladder, at least, if you looked at it?

Mr. Kilpatrick: We will object to that question. The witness has answered the question at least a dozen times. He does not recall seeing these when he looked in.

The Court: Sustained.

Q. (By Mr. Gallagher): You are not testifying that you looked in the direction of the ladder and failed to see it, are you, Mr. Wise?

Mr. Kilpatrick: Objection to the question again, your Honor. That question or questions similar to it have been asked and answered.

The Court: This is cross examination. I think in the present form it is a proper question.

Mr. Gallagher: May he have it read, so he will have it in mind?

(The question was read.)

The Witness: No. If I can explain, I am not testifying that I saw it by that answer—I mean I just don't recollect [146] seeing it when I looked in,

(Testimony of George E. Wise.)

but I could see there was nothing on the floor and see the pipe railings.

Q. (By Mr. Gallagher): You don't recollect having looked at that specific location before you walked in the masthouse, isn't that true?

A. I just don't recall.

Q. You just don't remember one way or the other, is that a fair statement?

A. That is a fair statement.

Q. Mr. Wise, did you go inside of that masthouse at any time when the door was closed and locked?

A. I went in and closed it myself. I don't know whether I locked it, but I think you have to pull down——

Q. The dogs.

A. To dog it down. Not all of them, just the one handle, closing it up.

Q. So that the door can be locked and unlocked both from the outside and the inside?

A. Now, that I don't know.

Q. You locked it from the inside?

A. I don't know whether I locked it. I closed it, whether it was locked I am not sure.

I think that this dog comes over here and holds it closed, just the one will hold it (indicating).

Q. You think it does. Are you testifying under oath [147] that that dog falls over by itself?

A. No, I am sure I did it.

Q. Very well. Now, Mr. Wise, on the day when you were up there and these pictures were taken,

(Testimony of George E. Wise.)

the hatch was completely covered and closed over, wasn't it? A. Yes.

Q. Now, in Plaintiff's Exhibit Number 1 you are part way down the ladder, aren't you?

A. Yes.

Q. How did you get in the position in which you are shown in Plaintiff's Exhibit Number 1? What did you hold onto before you took your first step on the ladder, if you held onto anything?

A. Let's see, I know I never came up from below. I went down from this way (indicating). And how I got there I don't know, frankly.

Q. Well, you know that the only way you got on the ladder was from the masthouse deck, don't you? A. Yes, that is right.

Q. The masthouse deck is this area shown at the bottom of Plaintiff's Exhibit Number 1, isn't it?

A. Yes.

Q. So you walked in through the door shown in Plaintiff's Exhibit Number 3 and stepped on the masthouse deck, didn't you? [148]

A. Yes, I am sure I did. I have no specific recollection but I would gather I did.

Q. And the shaft with the ladder in it was immediately to your left as you stepped through the door and stood upon the deck of the masthouse, wasn't it? A. Yes.

Q. So that you didn't have to walk, or you didn't walk over here by the ventilator shaft in order to get into the ladder shaft, did you?

A. Whether that picture was taken before the

(Testimony of George E. Wise.)

others—we were in there for quite awhile. Whether I came from some other part I don't know.

I wouldn't have—in other words, I just walked in. I wouldn't have had to go to this side to get to this side (indicating).

Q. It was your intention before you stepped into the masthouse, at least on one occasion, to get onto the ladder in the escape shaft and go down it, wasn't it? A. Yes.

Q. And when you stepped into the masthouse for that purpose, all you had to do was to step across the coaming and walk through the door, take hold of the stanchion at the corner of the pipe railings or take hold of the top pipe railing, and then reach down with your foot and put it on the top rung of the ladder, isn't that correct? [149]

A. That is one way of doing it.

Q. Is that the way you did it, or did you do it some other way?

In other words, did you climb over this pipe railing which surrounded the ventilator shaft and then climb over the second set of rails, in order to get onto the ladder in the escape shaft, or did you just walk in there and put your hand on this pipe railing and put your foot down on the top rail of the ladder, as your first step?

A. I don't recall, but if you would want me to guess what I might have done——

The Court: No, don't guess.

Q. (By Mr. Gallagher): No.

(Testimony of George E. Wise.)

The Court: If you don't recall, you can't answer the question.

Q. (By Mr. Gallagher): Well, did you hold onto anything with your hands before you got into the position shown in Plaintiff's Exhibit Number 1? If so, what?

A. I don't recall, but I would think——

The Court: Now, no. We don't want you to speculate.

Q. (By Mr. Gallagher): What is your best recollection?

A. I am a lawyer; I know I shouldn't think.

The Court: If you can recall do so. If you can't, say so.

The Witness: I don't recall specifically, Mr. Gallagher. [150]

Q. (By Mr. Gallagher): Well, is it your best recollection that you got into this position where you are shown in Plaintiff's Exhibit 1 without your hands touching anything in that masthouse, until you reached a point where your hands are grasping the top rung of the ladder in the escape shaft?

A. No, I would have remembered definitely if I had gotten there under those circumstances.

Q. The only thing for you to hold onto would be the stanchion or these pipe railings?

A. Or this portion over there, that extends out here (indicating). One way or the other I would assume I would have grabbed to that, or that (indicating).

Q. This portion of what you say is the deck,

(Testimony of George E. Wise.)

that is the upper part of the steel bulk work which separates the two shafts, isn't it?

A. That is correct.

Q. In order to take hold of that, it would be at your foot level if you were standing on the deck, wouldn't it? A. Yes.

Q. So in order to get hold of that, before you touched the rung of the ladder, you would have to do a good bend over with your toes reaching—with your fingers reaching at least down to your toes, wouldn't you?

A. Not dissimilar to the way I have gone down many ladders in the navy. I mean—that is perfectly possible. [151]

Q. You don't recall stepping onto the top rung of the ladder without taking hold of anything else that was available there as a handhold, do you?

A. No. I might even have held onto the—something along the side here (indicating).

Q. Over here (indicating)?

A. That, or any of these things (indicating). I don't have any specific recollection.

Q. Isn't it your recollection, your best recollection, Mr. Wise, that you did take hold of something with your hand to steady yourself before you reached the position you are in in Plaintiff's Exhibit 1? A. Yes.

Q. Now, did you go all the way down the ladder? A. No.

Q. How far did you go?

A. Just as I am shown there (indicating).

(Testimony of George E. Wise.)

Q. Then did you climb up? A. Yes.

Q. And what did you hold onto in getting up to the deck level?

A. I don't recall specifically, but again I would assume either——

Q. I am not asking you to assume.

A. I don't have any specific recollection. [152]

Q. Now, where did you get—withdraw that.

Were you present when this drop light was procured, the drop light that shows down here (indicating)?

I don't remember what number that was. Is that 10? In Plaintiff's Number 10, were you present when that drop light was procured?

A. Yes, I was.

Q. Where did you get it?

The Court: He didn't testify he got it.

Mr. Gallagher: That is right, your Honor. I am sorry I tried to put that in his mouth.

The Witness: I didn't get it.

Q. (By Mr. Gallagher): You didn't bring the light in with you——

A. I am trying to recollect whether the photographer brought it or whether it was a light—whether he merely brought the floodlight.

He came with a box of equipment and camera equipment. And I recall, if you want me to explain this,——

Q. I just want you to answer that question, if you can. You didn't bring any floodlight on board, did you? A. No.

(Testimony of George E. Wise.)

Q. You didn't bring this floodlight that shows on the locker on the starboard side of the mast-house with you on board, did you?

A. No. [153]

Q. And the photographer didn't bring that, either, did he?

A. This one (indicating)?

Q. Yes. That one that shows in Plaintiff's—

A. No.

Q. —Exhibit 4.

A. No, I don't know whether that is a floodlight or what it is. It is something—

Q. It looks like a reflector of some kind, doesn't it? A. Yes.

Q. That was there when the locker was opened up for you on your visit to the vessel?

A. Yes.

Q. Did you see an electric plug outlet here on the after bulkhead of masthouse number two in this place where I am pointing on Plaintiff's Exhibit 7. (indicating)?

See this device right here (indicating)?

A. I don't recall.

A Juror: May I ask, what is meant by mast-house number two?

Mr. Gallagher: Masthouse number two is this structure between hatch number two and hatch number three. That is, all of these pictures—

The Juror: All the pictures—

Mr. Gallagher: All the closeups are pictures of [154] masthouse number two.

(Testimony of George E. Wise.)

The Juror: Masthouses, plural?

Mr. Gallagher: No, masthouse; only one masthouse number two.

The Court: You agree with that, counsel?

Mr. Simpson: Yes, your Honor.

Mr. Gallagher: I think that is all, your Honor.

The Court: Redirect examination of Mr. Wise?

Mr. Simpson: No redirect, your Honor.

Mr. Simpson: No direct, your Honor. * * * * *

Thursday, Oct. 6, 1955. 9:30 A.M.

Mr. Gallagher: Your Honor, we have a stipulation which will answer a question asked by one of the jurors.

The access doorway to the masthouse we have been talking about is 54 inches high and 21 inches wide.

Mr. Simpson: So stipulated.

Mr. Kilpatrick: You were on page 4, line 22 of the Kalnin deposition.

Mr. Simpson: That is correct.

Mr. Kilpatrick: I might suggest we back up——

Mr. Gallagher: To line 20, page 3.

Mr. Kilpatrick: ——to line 20, page 3, and bring the jury in on the last question again.

Mr. Simpson: “Would you tell us whom you referred to when you used the word ‘we’?”

Mr. Kilpatrick: “There is no such thing as one man going down a hold. There was Hutchison and four other sailors and myself down in that hold.”

Mr. Simpson: “What did you do with reference to this group?”

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "I told them what to do and laid out the work." [159]

Mr. Simpson: "Can you be specific as to the time of the day?"

Mr. Kilpatrick: "That was about eight o'clock in the morning and we turned to in No. 3 hatch. The first thing we did there was open one section, aft section of No. 3 hatch. There's a ladder there and there's also a ladder in midship house. You can use either way to go down that hold."

Mr. Simpson: "Now, what happened after you gave these orders, that you observed?"

Mr. Kilpatrick: "Well, I already told you, went down by the hatch and went to work."

Mr. Simpson: "For how long did you work?"

Mr. Kilpatrick: "Until ten o'clock."

Mr. Simpson: "Then what did you do?"

Mr. Kilpatrick: "Then we stopped and went for coffee."

Mr. Simpson: "Then what did you do?"

Mr. Kilpatrick: "At 10:15 we went back in to clean up again, finish the job."

Mr. Simpson: "How long did you work?"

Mr. Kilpatrick: "Worked until dinner."

Mr. Simpson: "How long was that?"

Mr. Kilpatrick: "Knocked off about ten to twelve. Always give time to clean up."

Mr. Simpson: "For how long did you observe Mr. [160] Hutchison working in this hold?"

Mr. Kilpatrick: "He worked until dinner time."

(Deposition of Ernest Kalnin.)

Mr. Simpson: "Did you observe Hutchison leave the hold?"

Mr. Kilpatrick: "He left to come up dinner time. He left about ten minutes to twelve, the same as the rest of the gang."

Mr. Simpson: "Was there any occasion thereafter when you observed Mr. Hutchison?"

Mr. Kilpatrick: "Well, I seen him once more after that, coming from the mess room."

Mr. Simpson: "Did you observe anything in particular about him?"

Mr. Kilpatrick: "No."

Mr. Simpson: "When was the next time that you observed Mr. Hutchison?"

Mr. Kilpatrick: "That was about—in Philadelphia, I believe."

Mr. Simpson: "About Philadelphia?"

Mr. Kilpatrick: "In Philadelphia."

Mr. Simpson: "When was that?"

Mr. Kilpatrick: "That was when we found him then."

Mr. Simpson: "What date was it, approximately what time?"

Mr. Kilpatrick: "Before arrival in Philly on April [161] 30th, about six days later."

Mr. Simpson: "Where did you observe Mr. Hutchison?"

Mr. Kilpatrick: "It was No. 3 masthead."

Mr. Simpson: "What did you observe about Mr. Hutchison at the time?"

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "Which way do you mean that? At the time I found him?"

Mr. Simpson: "What did you see?"

Mr. Kilpatrick: "He looked at me like he was dead.

Mr. Simpson: "I am not interested in what he appeared there to you. What did you actually see?"

Mr. Kilpatrick: "Down there?"

Mr. Simpson: "That's right."

Mr. Kilpatrick: "He was down there — looked like the man was asleep, but when I seen who it was, I knew the guy was dead right there."

Mr. Simpson: "What did you do then?"

Mr. Kilpatrick: "Got the mate and called for an ambulance and they took over from there on. They wouldn't let us touch him or anything."

Mr. Simpson: "Was this the first occasion when Hutchison had been missed?"

Mr. Kilpatrick: "Oh, he was missed, but I figured he went ashore, as guys do when they want a day off or so, they just go ashore." [162]

Mr. Simpson: "Did you or any other person observed by you make a search?"

Mr. Kilpatrick: "No, we—the only place we searched for him was in the forecastle and the mess room; and when we didn't find him in there, we just told the mate to order another sailor, and we did, thinking he was left behind."

Mr. Simpson: "How long had you been on the Linfield Victory?"

Mr. Kilpatrick: "I think I was on there about

(Deposition of Ernest Kalnin.)

four and a half months, four months anyway.”

Mr. Simpson: “Mr. Kalnin, I am showing you here certain photographs which I would like you to identify if you can. This particular photograph, have you ever seen that before?”

Mr. Kilpatrick: Counsel, do you know what that photograph is?

Mr. Simpson: That is marked as “Roy Chapin No. 1”. It would be one of the exhibits.

Mr. Gallagher: It is this one (indicating).

The Court: Those are photographs on the board.

Mr. Simpson: Photographs already admitted in evidence.

The Court: I think, being as small as they are, they ought to be placed about midway of the jury box so all the jurors can see them. [163]

Mr. Gallagher: Mr. Simpson, the photograph that the witness is referring to is this one here, isn't it (indicating)?

Mr. Simpson: That is correct, Plaintiff's 11.

Mr. Gallagher: Here in evidence.

Mr. Simpson: Marked “Roy Chapin No. 1”.

Mr. Kilpatrick: “This particular ship looks like Linfield Victory but I don't see no name on it. It could be Linfield Victory. You see the name is all knocked out. You really can't tell one ship from another—Victories, they all look alike.”

Mr. Simpson: “These I would like you to mark in the order that I give them to you, Mr. Chapin.

“(Photograph marked ‘No. 1, Roy Chapin, N.P., May 17, 1952’)”

(Deposition of Ernest Kalnin.)

"Here I show you another photograph of the same ship, looking forward, and ask you to identify what you see here, if you will."

Mr. Kilpatrick: May we interrupt to identify that? It is marked "No. 2, Roy Chapin, N.P., May 17, 1952".

Mr. Gallagher: It is No. 7, Plaintiff's Exhibit No. 7 in evidence here.

Mr. Simpson: So stipulated.

Mr. Kilpatrick: Suppose we read the next portion from here. [164]

Mr. Gallagher: That is all right, if his Honor has no objection. May we stand here?

The Court: Certainly.

Mr. Gallagher: Thank you.

Mr. Kilpatrick: "Well, that is No. 3 hatch——"

Mr. Gallagher: He didn't ask the question yet.

Mr. Kilpatrick: I believe he did.

Mr. Gallagher: Yes, that is right.

Mr. Kilpatrick: "Well, that is No. 3 hatch, and this is the locker which leads down into the hold on the port side, that is, on the left-hand side going up."

Mr. Simpson: "Now, let me ask you to identify that again. You stated this was the locker?"

Mr. Kilpatrick: "The stairway."

Mr. Gallagher: Then I said this statement:

"He said 'This is the No. 3 hatch and this is the locker.' I didn't see any hatch there."

Mr. Simpson: "You do in this picture."

(Deposition of Ernest Kalnin.)

Mr. Gallagher: Then I answered Mr. Simpson's statement:

"That's the one that looks straight through the center of the ship. I see. I am sorry. That's right. I am no sailor, you see, and I wasn't paying any attention."

Mr. Kilpatrick: The witness said:

"You will be before you leave." [165]

Then the answer:

"This is the same picture, only with the mast-house doors open."

He is there referring to "No. 3, Roy Chapin, May 17, 1952".

Mr. Gallagher: That is No. 8 in evidence here; correct?

Mr. Simpson: Correct.

Mr. Gallagher: This is 1 here.

Mr. Simpson: "Have you ever seen that?"

Mr. Kilpatrick: "This is the entrance to the ventilator shaft, here where the railing is; and you can easily see the stairway leading down to the hatches, down to No. 3 hatches."

Mr. Gallagher: Then I interjected this question: "What did he say, that was the ladder?"

Mr. Kilpatrick: The witness said:

"Ladder or stairway; call it anything you want."

Mr. Gallagher: Mr. Simpson said, "He is ashore now."

Mr. Simpson: "I show you another one here and ask you to tell us what you see there."

Mr. Kilpatrick: "Well, as I say, ventilator, and

(Deposition of Ernest Kalnin.)

same thing leading down, the ladder leading down into the hatch."

Mr. Simpson: "It is the ladder on the left and ventilator on the right?" [166]

Mr. Kilpatrick: "That's right."

The witness was identifying photograph marked No. 4, Roy Chapin, May 17, 1952".

Mr. Gallagher: It is Plaintiff's No. 2 in evidence here. Correct?

Mr. Simpson: Correct.

"Tell us what you see here, in this photograph."

Mr. Kilpatrick: "This is the stairway or ladder leading down into the hold on the left again, and just a small part of the ventilator showing."

Excuse me. Withdraw that. The witness there is——

Mr. Simpson: Is pointing——

Mr. Kilpatrick: Which is he pointing to, No. 4 or 5 of Roy Chapin?

Mr. Simpson: No. 5.

Mr. Kilpatrick: That is this one here (indicating)?

Mr. Gallagher: That is correct. That is No. 9 in evidence here, as Plaintiff's exhibit. Is that correct?

Mr. Simpson: Correct.

Mr. Kilpatrick: The witness' answer there was:

"This is the stairway or ladder leading down into the hold on the left again, and just a small part of the ventilator showing."

Mr. Simpson: "What do you observe here?"

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "This is your ventilator itself [167] with—with a cluster light hanging down in it. I don't suppose you want me to mention a pair of shoes sticking out."

That would be——

Mr. Gallagher: No. 10, Plaintiff's Exhibit No. 10 in evidence here.

Mr. Kilpatrick: It is marked in the deposition as Roy Chapin's No. 6.

Mr. Gallagher: Some man is standing with his feet on the center pipe railing.

Mr. Simpson: "From your observation on this ship, approximately how deep is that?"

Mr. Kilpatrick: "Oh, I'd say twenty feet."

Mr. Simpson: "What do you observe here?"

Mr. Kilpatrick: This is referring to Roy Chapin's No. 7.

Mr. Simpson: That is correct.

Mr. Gallagher: Roy Chapin No. 7 is Plaintiff's Exhibit No. 6 in evidence here.

Mr. Kilpatrick: "That is overhead of the ventilator."

Mr. Simpson: "What is this?"

Mr. Kilpatrick: "Screen fire preventer."

Mr. Gallagher: Then I asked him this question: "What is that you say?"

Mr. Kilpatrick: The witness replied: "Screen."

Mr. Gallagher: "That is part of No. 7, isn't it?"

Mr. Simpson replied, "That is No. 7", referring to the "7" which had been placed on the photo-

(Deposition of Ernest Kalnin.)

graph by the notary public at the time the deposition was deemed taken.

Is that correct, Mr. Simpson?

Mr. Simpson: That is correct. It is agreed by counsel to delete the following portion of the deposition, to page 14, commencing with——

Mr. Gallagher: 13—that is right, page 14.

Mr. Simpson: Commencing with line 7.

“Who was Hutchison’s superior, or who gave him orders?”

Mr. Kilpatrick: “I did.”

Mr. Simpson: “What were his wages?”

Mr. Kilpatrick: “Roughly, he’d make average wages about 270 something a month plus anywhere from \$80 to \$100 a month overtime, which was an average.”

Mr. Simpson: “I don’t think of any other questions at the present moment. Do you have some, Mr. Gallagher?”

Mr. Gallagher: And I replied:

“Yes, I have. Thank you.”

I will read the cross examination, the questions. May I use your copy?

Mr. Simpson: Yes. [169]

* * * * *

Mr. Gallagher: “Are you a member of the local union here?”

Mr. Kilpatrick: “I am a member of the Sailors Union of the Pacific.”

Mr. Gallagher: “What local?”

Mr. Kilpatrick: “Any local. If you belong to one

(Deposition of Ernest Kalnin.)

you belong to all, you know, any place on the coast.”

Mr. Gallagher: “What was your last employer’s name?”

Mr. Kilpatrick: “Olson Steamship.” [171]

* * * * *

Mr. Gallagher: “As I understand your direct examination, you signed on as a member of the crew of the Linfield Victory in New York.”

Mr. Kilpatrick: “No, I signed on in Frisco.”

Mr. Gallagher: “I see. And Mr. Hutchison signed on—at least, he got on the ship in New York?”

Mr. Kilpatrick: “That’s right.”

Mr. Gallagher: “You didn’t see Mr. Hutchison sign any articles, did you?”

Mr. Kilpatrick: “No. I don’t know. That is up to the captain.”

Mr. Gallagher: “You didn’t actually see him sign any articles?”

Mr. Kilpatrick: “No.”

Mr. Gallagher: “The ship went from New York to Baltimore?”

Mr. Kilpatrick: “That’s right, just the regular loop she makes, you know.”

Mr. Gallagher: “How far belong the main deck of the ship which is shown in photograph No. 2—I will withdraw that question. Is this deck alongside the hatch shown [172] in picture No. 2 the main deck?”

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: Do you want to refer to the exhibits in evidence?

Mr. Gallagher: I think perhaps, your Honor please, the jurors having been told what number an exhibit is here, when it is referred to as a Chapin number, No. 2, No. 3, No. 4, so forth, will probably be sufficiently oriented to keep track of it without pointing out each time.

If the jurors want us to do it, we will tell them what the exhibit is here. If they don't want it, let's just go ahead and use the numbers that Chapin put on the pictures.

The Court: The jurors will not be backward in telling counsel when they need to have a particular picture pointed out and identified.

A Juror: I think it ought to be pointed out.

Mr. Gallagher: Chapin No. 2 is No. 7 in evidence here. And each one of these photographs, where we refer to the fact that Chapin put a number on it, it is written right on the face of the photograph by Mr. Chapin.

But we will try to identify each one of them as we go along.

Mr. Kilpatrick: I believe your question started on line 14, at page 16.

Mr. Gallagher: That is right. "How far below the main deck of the ship which is shown in photograph [173] No. 2—I will withdraw that question. Is this deck alongside the hatch shown in picture No. 2 the main deck?"

(Deposition of Ernest Kalnin.)

That No. 2 being Plaintiff's Exhibit No. 7 in evidence here.

Mr. Kilpatrick: "That's the main deck."

Mr. Gallagher: "And the masthouse that you have been referring to is on the right-hand side of the mast—the left-hand side of the mast as you look at the picture?"

Mr. Kilpatrick: "Would be left-hand side, port side of the ship, that is, going from aft going forward would be on the left-hand side."

Mr. Gallagher: "What do you call these things here?"

Mr. Kilpatrick: "Well, masthouse doors."

Mr. Gallagher: "They are watertight doors, aren't they?"

Mr. Kilpatrick: "That's right."

Mr. Gallagher: "What is this door over here on the right-hand side of the mast?"

Mr. Kilpatrick: "It is a gear locker—keep your extra wires and slings and stuff like that in there."

Mr. Gallagher: "How far below the level of the main deck was this hold that you and the men who were working with you were cleaning out on the morning that you have referred to?" [174]

Mr. Kilpatrick: "It was the shelter deck."

Mr. Gallagher: "Next deck under?"

Mr. Kilpatrick: "First deck down from the main deck, and the next deck below that is called the lower hold."

Mr. Gallagher: "Now, did all of you go down there at about the same time from the main deck?"

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "Roughly, yes. Only takes one man at a time on the ladder."

Mr. Gallagher: "How did all of you go down?"

Mr. Kilpatrick: "Some went down through the masthouse and some went down through the aft part of No. 3."

Mr. Gallagher: "How did you go down?"

Mr. Kilpatrick: "I didn't. I could see everything from the deck. I was standing at the winches."

Mr. Gallagher: "Did you see Mr. Hutchison go down?"

Mr. Kilpatrick: "He went down in the morning, yes."

Mr. Gallagher: "How did he go down?"

Mr. Kilpatrick: He didn't go down this way that time, but he came up that way noon time."

Mr. Gallagher: "When you say he came up that way, you are referring to the ladder in the shaft which is right next to the ventilator shaft?"

Mr. Kilpatrick: "Yes. He came up through this ladder in this masthouse."

Mr. Gallagher: "You are referring to picture No. 4," [175] which is Plaintiff's No. 2 in evidence on this trial, aren't you?"

Mr. Kilpatrick: "I don't know the number of the picture—that's what it is."

Mr. Gallagher: "All right, now can you show me anything in any of these photographs to indicate the route taken by Hutchison in going down to the shelter deck?"

Mr. Kilpatrick: "Going down—I never seen him

(Deposition of Ernest Kalnin.)

go down. He went down through this end of the hatch to work. Coming up, he went this way."

Mr. Gallagher: "Did you see him go down?"

Mr. Kilpatrick: "Yes. I was standing right there."

Mr. Gallagher: "Was the hatch open?"

Mr. Kilpatrick: "One section open, the aft part. Right square middle of the winches is the ladder."

Mr. Gallagher: "On the forward end?"

Mr. Kilpatrick: "Same thing on this end as this end."

Mr. Gallagher: "The ladder going from the main deck down—there is a ladder which goes from the forward hatch coaming on—Is that hatch No. 2 or 3?"

Mr. Kilpatrick: "No. 3."

Mr. Gallagher: "There is a ladder which goes from the forward hatch coaming of Hatch No. 3 down to the level of the shelter deck, and there is also another ladder at the aft coaming of Hatch No. 3 which goes down [176] to the shelter deck?"

Mr. Kilpatrick: "That's right, two."

Mr. Gallagher: "Both of these ladders are vertical ladders, aren't they?"

Mr. Kilpatrick: "That's right, straight up and down."

Mr. Gallagher: "Somewhat similar to the ladder which is shown on picture No. 5?"

Which is Plaintiff's No. 9 in evidence here?

Mr. Kilpatrick: "It is exactly like that."

Mr. Gallagher: "O. K. So that some of the men

(Deposition of Ernest Kalnin.)

who were working down there with Mr. Hutchison went down the ladder in the shaft adjacent to the ventilator shaft and some of the men went down the ladder which was right at the aft coaming of Hatch No. 3?"

Mr. Kilpatrick: "That's right, you know, either way; both leads to the same place."

Mr. Gallagher: "And when Mr. Hutchison came up, you were still on deck?"

Mr. Kilpatrick: "I was still on deck until they all came up."

Mr. Gallagher: My inquiry, your Honor, standing here so close to the jurors and talking as loud as I am, that I am disturbing them.

A Juror: May I ask a question at this point? I am not quite clear where the other ladder is at. Will that be brought [177] out later?

Mr. Kilpatrick: Could we stipulate on it?

Mr. Gallagher: We will have to explain it. Let's talk it over so I don't say anything I shouldn't say in front of the jury.

I think we will explain that. If you will look at Plaintiff's Exhibits 7 and 8, you see, this black covering material, and that is the tarpaulin which is stretched over the top of the hatch coverings (indicating).

When that is removed, this tarpaulin, and the hatch covers themselves, then there is an opening in the deck as wide as this picture shows the hatch coaming to be, and as long as this picture shows the hatch to be.

(Deposition of Ernest Kalnin.)

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When that is removed, this tarpaulin, and the hatch covers themselves, then there is an opening in the deck as wide as this picture shows the hatch coaming to be, and as long as this picture shows the hatch to be.

(Deposition of Ernest Kalnin.)

Now, on the forward end of the hatch there is a coaming, like this rail here (indicating), and in the center of the width of that forward end there is a ladder which is straight down, up and down, and the upper end of the ladder is bolted or welded to the inside of the hatch coaming below the upper portion.

There is exactly the same kind of a vertical steel ladder attached to the inside of the aft part of the hatch coaming, and those are the ladders that Mr. Kalnin was referring to as being in Hatch No. 3.

Is that right?

Mr. Simpson: That is correct. [178]

Mr. Gallagher: Is that satisfactory?

The Juror: In other words, there is a ladder here and this picture shown there, there is a ladder goes down there and one goes down there (indicating)?

Mr. Gallagher: That is right.

Mr. Kilpatrick: And a third ladder——

Mr. Gallagher: The third ladder is inside the masthouse.

Mr. Kilpatrick: The third ladder is inside the masthouse.

Mr. Gallagher: They all lead to the same place.

Mr. Kilpatrick: We agreed to stipulate these ladders were between winches.

Mr. Gallagher: I thought we covered that by saying they are in the center of the width of the hatch coaming. We have stipulated that these devices here, which you see on Plaintiff's Exhibits 7 and

(Deposition of Ernest Kalnin.)

8, are the winches, and there is a set of winches at the forward end of Hatch No. 3 and a similar set of winches at the after end, so that the ladders are right here in the space between the winches.

That is right there in the center of the hatch coaming, is that clear?

The Juror: That is clear. The one on that end is referred to in this picture No. 2?

Mr. Gallagher: No.

Mr. Kilpatrick: No.

Mr. Gallagher: The one referred to up here is not in [179] the hatch at all (indicating). That is inside this masthouse, which is shown.

The Juror: Yes. Oh, yes. I am sorry.

Mr. Gallagher: There are three ladders that have been referred to.

The Juror: I have it now.

Mr. Kilpatrick: This masthouse is this masthouse (indicating).

The Juror: I have got it now.

Mr. Gallagher: May we stipulate when Mr. Kalnin referred to the aft end of Hatch No. 3 being uncovered, he was referring to the after portion of it, or the part toward the rear end of the ship.

Mr. Kilpatrick: Yes, his testimony was in response to your question, that the hatch—the answer was “One section open, the aft part. Right square middle of the winches is the ladder.”

The Court: Now, you have apparently finished the explanation that a juror inquired about. Is it

(Deposition of Ernest Kalnin.)

satisfactory to all counsel or does it need any clarification, amendment or correction?

Mr. Simpson: Quite satisfactory, if satisfactory to the jury.

Mr. Gallagher: It is satisfactory to me.

Mr. Kilpatrick: Are you on page 19, line 2?

Mr. Gallagher: That is right.

“O. K. So that some of the men who were working down there with Mr. Hutchison went down the ladder in the shaft adjacent to the ventilator shaft and some of the men went down the ladder which was right at the aft coaming of Hatch No. 3?”

Mr. Kilpatrick: “That’s right, you know, either way; both leads to the same place.”

Mr. Gallagher: “And when Mr. Hutchison came up, you were still on deck?”

Mr. Kilpatrick: “I was still on deck until they all came up.”

Mr. Gallagher: “And you observed Mr. Hutchison coming up the ladder which is in the shaft adjacent to the ventilator shaft?”

Mr. Kilpatrick: “He came up and came out through the masthouse and walked between the winches and one side to the mess hall.”

Mr. Gallagher: “That is a little too complicated for me. I’d like to keep this thing simple. Did you see Mr. Hutchison come up the ladder which was in the shaft adjacent to the ventilator shaft?”

Mr. Kilpatrick: “I tried to explain: I seen him come out of the masthouse. I wasn’t watching him coming up the ladder.” [181]

(Deposition of Ernest Kalnin.)

Mr. Gallagher: "You didn't see him come up the ladder?"

Mr. Kilpatrick: "He had to, in order to come out of the masthouse."

Mr. Gallagher: All you saw was that Mr. Hutchison came out of this masthouse door?"

Mr. Kilpatrick: "That's right."

Mr. Gallagher: "The only way he could have gotten up from the shelter deck to the main deck was to come up this ladder in the shaft adjacent to the ventilator shaft?"

Mr. Kilpatrick: "Yes, that's the only way he could come up that way unless he could come up on the other end, which he didn't."

Mr. Gallagher: "He couldn't have come up any ladder except the one that is shown in this picture, marked No. 4," which is Plaintiff's Exhibit No. 2 in evidence here, "to come out of the masthouse door, could he?"

Mr. Kilpatrick: "No. He had to come up that ladder."

Mr. Gallagher: "Then, when he came up—or when you saw him walk out of the masthouse door, you say he walked aft then?"

Mr. Kilpatrick: "He went towards the mess hall."

Mr. Gallagher: "Along the starboard side of the ship?"

Mr. Kilpatrick: "That's right." [182]

Mr. Gallagher: "Did you see him in the mess hall?"

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "No. I seen him on the companionway, coming from the mess hall. Evidently he got there before I did."

Mr. Gallagher: "Then you didn't see him go into the mess hall at all?"

Mr. Kilpatrick: "No. I saw him come out of the mess hall. That's the only place he could have been."

Mr. Gallagher: "Did you see where he went after that?"

Mr. Kilpatrick: "No, I didn't see where he went after that."

Mr. Gallagher: "Did the other men who had been working down at the level of the shelter deck of hatch No. 3 go back to that part of the ship and continue working after lunch?"

Mr. Kilpatrick: "One o'clock, yes."

Mr. Gallagher: "How long did they work?"

Mr. Kilpatrick: "We worked until three that day, finished the job."

Mr. Gallagher: "Was Mr. Hutchison down there at any time between one and three?"

Mr. Kilpatrick: "No." [183]

Mr. Gallagher: "Now, when Mr. Hutchison didn't show up at one o'clock, you took it for granted that he had gone ashore, didn't you?"

Mr. Kilpatrick: "That's right."

Mr. Gallagher: "And that was the reason you didn't conduct any search for him?"

Mr. Kilpatrick: "That's right."

Mr. Gallagher: "As a matter of fact, you had

(Deposition of Ernest Kalnin.)

the mate call the police department to see if he might possibly be in jail, didn't you?"

Mr. Kilpatrick: "That's right."

Mr. Gallagher: "And when you found out he wasn't in jail you sent for another sailor to take his place?"

Mr. Kilpatrick: "That's right."

Mr. Gallagher: "Do you recall giving testimony at a merchant marine investigating unit of the United States Coast Guard at Philadelphia, Pennsylvania, on May 1, 1951?"

Mr. Kilpatrick: "Yes, that's where we went then."

Mr. Gallagher: "At that time were you asked the following questions and did you give these answers:"

Questions by Mr. Bikle:

"Q. You saw him at lunch?"

"A. I seen him at dinner time but I didn't stay long, coming out the mess room just had a [184] bowl of soup, started out of the mess room. I didn't see him any more after that."

Questions by the Investigating Officer:

"Q. The last place you saw him was in the mess room?"

"A. That was the last place, yes."

"Q. What was his condition regarding sobriety?"

"A. Was he sober?"

"Q. Yes."

"A. Oh, yes, he was sober, slight hangover."

Then my questions started again:

(Deposition of Ernest Kalnin.)

"Did you give those answers to those questions?"

Mr. Kilpatrick: "Yes. He was sober that day, I know that."

Mr. Gallagher: "But he did have a hangover?"

Mr. Kilpatrick: "I guess so, from the night before—didn't feel good."

Mr. Gallagher: "Had you seen him the night before?"

Mr. Kilpatrick: "No, but I know he was ashore the night before."

Mr. Gallagher: "So, on the day of the accident when you saw him you came to the conclusion that he had been drinking but that all he had was a hangover?"

Mr. Kilpatrick: "That's all. When I woke him up in the morning he was in the bunk and [185] there was no bottles, and he was just feeling rough, that's all."

Mr. Gallagher: "When you say he was just feeling rough, what do you mean by that?"

Mr. Kilpatrick: "You know, when a guy stays up late—it is his duty to go to work and he knew it and had to turn to."

Mr. Gallagher: "I know what a hangover is. What did you mean when you said he had a hangover?"

Mr. Kilpatrick: "Well, just feeling rough."

Mr. Gallagher: "Hangover from what?"

Mr. Kilpatrick: "I don't know."

Mr. Gallagher: "Would you say hangover with respect to drinking?"

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "Could have been out late, going around somewhere, too, you know."

Mr. Gallagher: "Well, tell me what you meant when you used the word hangover before the Coast Guard investigation?"

Mr. Kilpatrick: "Did you ever wake up with a hangover, feeling rough—don't feel good."

Mr. Gallagher: "Was it your testimony at the Coast Guard—or, did you intend to convey to the Coast Guard, when you used the word hangover, that the man merely might have been up late?"

Mr. Kilpatrick: "Well, that usually results [186] from—because you don't get no sleep—don't feel good."

Mr. Gallagher: "Then you didn't mean when you said hangover that he appeared to have been drinking the night before and had a hangover from it?"

Mr. Kilpatrick: "I don't know whether he was drinking or not; I wasn't ashore with him."

Mr. Gallagher: "You still haven't answered my question. When you said he had a hangover, did you use that word to convey the impression that he had been drinking the night before and had some of the results of it the next day?"

Mr. Kilpatrick: "No, I didn't say that at all, didn't mean that at all, that he was drinking. I can't say the man was drinking; I wasn't with him; I don't know what he was doing. I know he had been out late, though."

(Deposition of Ernest Kalnin.)

Mr. Gallagher: "How did you know he had been out late?"

Mr. Kilpatrick: "He mentioned the fact he got in at four in the morning."

Mr. Gallagher: "He told you that himself?"

Mr. Kilpatrick: "He said, 'I hate to work today but I have got to do it.'"

Mr. Gallagher: "How long did you stay aboard the Linfield Victory altogether, Mr. Kalnin?"

Mr. Kilpatrick: "I shipped in Frisco, you know, round trip, plus another half a trip. Now, I don't know just [187] how long it takes. I don't pay any attention to time."

Mr. Gallagher: "How often did the members of the crew, to your knowledge, use the ladder which was in the shaft immediately adjacent to the mast-house ventilator shaft for the purpose of going to some deck below the level of the main deck and for the purpose of going to some deck below the level of the main deck and for the purpose of coming up to the main deck from a level below the main deck?"

Mr. Kilpatrick: "That ladder is put there for the use—for that purpose—when people are working on the winches, they don't want them to interfere with the winch drivers and get in the way and get hit."

Mr. Gallagher: "So they are used constantly?"

Mr. Kilpatrick: "All the time, yes."

Mr. Gallagher: "Day and night?"

Mr. Kilpatrick: "Whenever they are working."

(Deposition of Ernest Kalnin.)

Mr. Gallagher: "They work at night as well as daytime at times?"

Mr. Kilpatrick: "Sometimes."

Mr. Gallagher: "When they are unloading cargo or unloading?"

Mr. Kilpatrick: "We don't load cargo—sailors don't. Longshoremen use it all the time." [188]

Mr. Gallagher: "Was the hatch uncovered at the aft end of hatch No. 3 all during the day that you have been talking about?"

Mr. Kilpatrick: "Yes—heaving dirt slings out, you know, sweepings from the hold."

Mr. Gallagher: May I confer with Mr. Simpson a moment?

The Court: Yes.

Mr. Gallagher: We can stipulate at this point, your Honor, that when the witness refers to dirt slings he means a cloth or wire device in which the debris is placed, after being swept up in the hold, and then it is hooked together in some fashion and is hoisted out of the hatch by means of the winch.

Then they will send the empty sling down the same way, by means of the winch.

Mr. Simpson: So stipulated.

Mr. Gallagher: Thank you.

"So that the ladder at the aft hatch coaming of hatch No. 3 was available all during that day for the purpose of either going from the main deck down to the shelter deck or from the shelter deck up to the main deck?"

Mr. Kilpatrick: "Right. The ladder in that hatch

(Deposition of Ernest Kalnin.)

is one they use at all times when the hatch is [189] open, so you don't get hit with the winches' loads."

Mr. Gallagher: "When you said 'The ladder in that hatch,' you meant the ladder in the mast-house?"

Mr. Kilpatrick: "Yes. Ain't suppose to use the one by the winches."

Mr. Gallagher: "You weren't working cargo that day?"

Mr. Kilpatrick: "No, but we were heaving slings out."

Mr. Gallagher: "I see. Now, the last time you saw Mr. Hutchison, was he in the mess room, as you testified before the Coast Guard, or was he outside?"

Mr. Kilpatrick: "He was coming out from the mess room in a passageway."

Mr. Gallagher: "Was he still under cover?"

Mr. Kilpatrick: "He was inside."

Mr. Gallagher: "Inside the midshiphouse?"

Mr. Kilpatrick: "Right."

Mr. Gallagher: "So you didn't see him at any time out on deck after lunch?"

Mr. Kilpatrick: "No."

Mr. Gallagher: The next subject is one I am leaving out. Page 27.

Mr. Kilpatrick: We resume at page 27 with re-direct examination by Mr. Simpson.

Mr. Gallagher: You still have mine?

Mr. Simpson: I still have yours, Mr. Gallagher.

(Deposition of Ernest Kalnin.)

Mr. Gallagher: All right. I will come up there then.

Mr. Simpson: "Mr. Kalnin, simply by way of clarification of answers to questions by Mr. Gallagher: You testified that because you had told the police, I believe it was, or some one in Baltimore, that this man had probably gone ashore, that there was no reason for a search."

Mr. Gallagher: He didn't adopt it. Just read what the witness says. I think probably we are going to have to read the whole thing. It seems to have been settled that way.

Then I made this remark: "No, he didn't so testify. What he said was that they called the police to find out if he was in jail and that when they were told that he wasn't in jail they just sent for another man."

Mr. Kilpatrick: The witness said, "I will explain that."

Mr. Gallagher: Then I said, "He said the reason he didn't make a search was that he figured that the man had just gone ashore."

Mr. Kilpatrick: Then the witness said, "Which happens when you are alongside a dock."

Mr. Simpson: "Well, where such a conclusion as the one you have testified to is not reached, do you conduct a search on a ship?"

Mr. Kilpatrick: "Yes, looked in the mess room and in his room and he wasn't there, and called the hospital [191] and police stations and he wasn't there, so we ordered another sailor, that's all."

(Deposition of Ernest Kalnin.)

Mr. Simpson: "Mr. Gallagher has further asked you about the use of the word hangover. When Hutchison was awakened in the morning, what did you observe specifically? I know this is what Mr. Gallagher is interested in. What did you observe specifically in Mr. Hutchison's conduct?"

Mr. Kilpatrick: "Well, he wanted to sleep in. If I didn't give him a good shake he probably would sleep in—wouldn't turn to."

Mr. Simpson: "Did you observe anything in his conduct that would lead you to believe that he had been drinking?"

Mr. Kilpatrick: "No."

Mr. Simpson: "You have testified with respect to the ladder located in the masthouse, going from the main deck of the shelter deck, that was adjacent to the ventilator shaft. That was used frequently?"

Mr. Kilpatrick: "That's right."

Mr. Simpson: "To your knowledge, did Mr. Hutchison use it frequently?"

Mr. Kilpatrick: "No, I saw him come down and go to dinner."

Mr. Simpson: "That was the only time that [192] you had ever seen him use the ladder?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "With respect——"

Mr. Kilpatrick: Now, I think we stipulated to strike those questions, Mr. Simpson.

Mr. Gallagher: The rest of it is on the excluded subject.

Mr. Simpson: That concludes the Kalnin deposition then, your Honor.

* * * * *

Mr. Simpson: For the record, this is the reading of the deposition of Kent Stephen Castle, Jr., taken September 20, 1952, and commencing on page 6 at line 20 thereof:—

Mr. Gallagher: Can we stipulate this witness is Mrs. Hutchison's son-in-law?

Mr. Simpson: Yes.

"Will you state your occupation or profession."

Mr. Kilpatrick: "Merchant marine officer."

Mr. Simpson: "Are you presently aboard a ship?" [193]

Mr. Kilpatrick: "Yes."

Mr. Simpson: "What ship is that?"

Mr. Kilpatrick: "Joel Chandler Harris, coast-wise line."

Mr. Simpson: "What in general are your duties aboard the ship?"

Mr. Kilpatrick: "Stand bridge watch and supervise loading and discharge of cargo and general operation of the vessel when on watch."

Mr. Simpson: "Do you have a rating at the present time?"

Mr. Kilpatrick: "I am at present third mate aboard this vessel. I have been master with the same company up until a short while ago."

Mr. Simpson: "You were master of a ship?"

Mr. Kilpatrick: "All last winter back East, yes, until they laid about twenty of them up and they bounced us all back a little."

(Deposition of Kent Stephen Castle, Jr.)

Mr. Simpson: "How long have you been an officer in the merchant marine?"

Mr. Kilpatrick: "Received my first license in 1940, March of 1940."

Mr. Simpson: "Do you hold a master's license at the present time?"

Mr. Kilpatrick: "Unlimited master's license in steam, any tonnage, any ocean, for nine years [194] now, second issue."

Mr. Simpson: "Have you been an officer and actively practicing as an officer aboard ship since 1940?"

Mr. Kilpatrick: "Yes, except for some small intervals in between. I mean it is not exactly steady. I was for many years with Matson Navigation Company, but in the last four years prior to this I was in business for myself up north, in Humboldt Bay, and went back to sea about a year ago—or two years ago, it would be. I was tow-boating up there."

Mr. Simpson: "How long have you been connected with the merchant marine in some form?"

Mr. Kilpatrick: "More or less continuously since July of 1931, as seaman or officer."

Mr. Simpson: "When you were a master aboard ship, what type of ship was that master of?"

Mr. Kilpatrick: "Liberty ships, both during the war and lately."

Mr. Simpson: "When was the most recent time you were a master of a ship?"

Mr. Kilpatrick: "I came back from the East

(Deposition of Kent Stephen Castle, Jr.)

the middle of May of this year. That would be around May—first part of May. I don't know exactly."

Mr. Simpson: "In the period that you have been employed in the merchant marine, have you [195] had occasion to become familiar with a large number of ships and serve aboard a large number of ships?"

Mr. Kilpatrick: "I have served aboard nearly every type of vessel in the American Merchant Marine except the vessel in question in this case."

Mr. Simpson: "That is, Victory ship?"

Mr. Kilpatrick: "Victory, so-called Victory ship."

Mr. Simpson: "Have you ever been aboard a Victory ship?"

Mr. Kilpatrick: "Yes, I have. I was aboard the Linfield Victory in San Francisco."

Mr. Simpson: "Is that the only Victory ship you have been aboard?"

Mr. Kilpatrick: "I have been aboard casually to visit friends on one or two others before, just to come aboard and say hello."

Mr. Simpson: "In tonnage and size of ship, is the Liberty ship comparable to the Victory ship?"

Mr. Kilpatrick: "Very similar."

"That would be a matter of record, the tonnages are recorded. They are similar in tonnage, yes; the horsepower is different and the general layout of the vessel is a little different; but the actual gross tonnage is very close."

(Deposition of Kent Stephen Castle, Jr.)

Mr. Simpson: "In connection with your work as master and officer of a ship have you had occasion to become [196] familiar with devices installed aboard ships?"

Mr. Kilpatrick: "Yes, I have become familiar with shipboard practices, ever since the time I started going to sea—practices, how to work; and P.M.A. inspectors come around and give bulletins every month to its ships' officers, especially the chief mates."

Mr. Simpson: "I believe the question was merely whether you had, and your answer would be yes?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: Now, turn to page 14, line 4.

"Are you familiar with the Victory Ship Linfield Victory?"

Mr. Kilpatrick: "Familiar in the respect that I went aboard her."

Mr. Simpson: "Will you answer that yes or no."

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Did you have occasion to go aboard the Linfield Victory sometime in the past year or two?"

Mr. Kilpatrick: "I went aboard the Linfield Victory, as near as I can recall, in May of—latter part of May, it would be of 1951, in San Francisco."

We now turn to page 15, line 6. [197]

"Did you talk to anyone aboard ship at that time?"

Mr. Kilpatrick: "I introduced myself to the

(Deposition of Kent Stephen Castle, Jr.)

chief officer who was on duty and he showed me the space involved."

Mr. Simpson: Now, just a moment, I want to take this one step at a time. Do you recall the name of the chief officer?"

Mr. Kilpatrick: "Offhand, I can't. I met him only the one time and I can't—it was a rather short name, as I remember."

Mr. Simpson: "Was he aboard the ship at the time or did you meet him out on the deck?"

Mr. Kilpatrick: "He was aboard the vessel. I went aboard and introduced myself to him. He was the same mate that was on there when the accident occurred, I know."

Mr. Simpson: "Did he state that to you?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: We next turn to page 18, line 18.

"Did you examine the masthouse with the hatch door closed?"

Mr. Kilpatrick: Counsel, will you check page 16, line 14?

Mr. Gallagher: That is right. This part is [198] out, and this part is in. (Indicating.)

Mr. Simpson: I am sorry.

Mr. Kilpatrick: Is that the line, line 14?

Mr. Simpson: Yes, line 14.

"When you went out on deck, what did you do, after you went out on deck together?"

Mr. Kilpatrick: "We went to the—I believe they call it the No. 2 raised deck house, on deck. He showed me this ladder and trunk on the port side,

(Deposition of Kent Stephen Castle, Jr.)

and explained how the body was found, how it lay—the position in which it lay.”

Mr. Simpson: “Did you make an examination yourself of the masthouse and the area surrounding it?”

Mr. Kilpatrick: “Yes. I went up and down the ladder several times and looked down the trunk and looked about the interior of the masthouse or blower house, whatever they call it, on there.”

Mr. Simpson: Now we turn to page 18, line 18.

“Did you examine the masthouse with the hatch door closed?”

Mr. Kilpatrick: “The mate and I closed the hatch door to see just how dark it was in there. It was quite dark, and this was in late forenoon.”

Mr. Simpson: Next turn to page 19, line 17.

“Did you note any screen or other——” [199]

Mr. Gallagher: That word, I think, is——

Mr. Kilpatrick: We agreed that could stay in.

Mr. Gallagher: We didn’t agree to it. Maybe the judge ruled it could be.

The Court: I think I ruled it could stay in. It is descriptive. Of course, it is an opinion, to an extent, but it would be for the jury to decide what weight to give it.

Mr. Kilpatrick: Will you repeat the question, please?

Mr. Simpson: “Did you note any screen or other protective covering surrounding the ventilating shaft?”

Mr. Kilpatrick: “There was no screen over the

(Deposition of Kent Stephen Castle, Jr.)
ventilating shaft at all. It was open on the top.
There was a broken screen on the bottom, the hold
end of it, the lower end." [200]

* * * * *

"Q. (By Mr. Wise): I am taking this one step
at a time. Do you have an opinion as to whether
this area constituted a safe place to work?

"A. I have an opinion, yes.

"Q. (By Mr. Wise): What is that opinion?

"A. My opinion is that with proper illumination
or with the doors wide open so that daylight
could get in, it would be safe enough to work in the
area mentioned, in the area of the masthouse."

* * * * *

LORKAN FELIM CRAWFORD

called as a witness by the plaintiff, being first
sworn, was examined and testified as follows: [201]

The Clerk: Please be seated.

Your full name, sir.

The Witness: Lorkan Felim Crawford.

Direct Examination

Q. (By Mr. Simpson): Captain Crawford, I
am going to ask you to be sure and keep your voice
up so everyone in the courtroom can hear you, and
I will ask the jurors if any of you cannot, please
indicate that.

Captain Crawford, where do you live?

A. In Long Beach.

Q. Would you give me your address in Long
Beach?

(Testimony of Lorkan Felim Crawford.)

A. 1825 East First Street.

Q. How long have you lived there?

A. Three years.

Q. And where did you live before that?

A. 4245 East Third Street, Long Beach.

Q. Now, what is your vocation, Captain?

A. I am president of Crawford Nautical Schools and Crawford Nautical Advisers, and principal of Crawford Nautical Schools.

Q. Where are those schools located?

A. 802 South Palos Verdes and 129 West Eighth Street, San Pedro.

Q. Captain Crawford, did you go to college? Do you [202] have a degree regarding nautical schools?

A. I have no college degree.

Q. How far in your formal education did you progress? A. Well, high school.

Q. And thereafter you undertook this vocation referred to? A. Thereafter I went to sea.

Q. And in what capacity?

A. I started in as a deck cadet,—

Q. How old were you? A. 14.

The Court: You hadn't finished. You started in as a deck cadet, and you started to say something and counsel interrupted. Do you want to say something more?

The Witness: Yes. I started in as a deck cadet in a sailing vessel.

Q. (By Mr. Simpson): And for how long did you remain in that capacity? A. Four years.

Q. And then what did you do?

(Testimony of Lorkan Felim Crawford.)

A. I sailed in various ships, United States vessels, practically all over the world, until I went up through the grades and obtained a license as master of steam or motor vessels any gross tons, waters of any ocean.

Q. When did you obtain such a master's license? [203]

A. I would say about 40 years ago.

Q. Do you still have such a master mariner's license? A. Yes.

Q. Would you, Captain Crawford, tell me the experience and training that you have had with respect to your general vocational background?

A. I have sailed as a ship's officer. I was a pilot in San Francisco Bay and port captain for Richfield Oil Corporation; subsequently transferred to Long Beach, California, as port captain.

Q. For how long were you in the capacity of port captain at Long Beach?

A. I believe about four years, until the last war started, and I went back to sea as master of a ship.

Q. Now, in your school, the Crawford Nautical Schools, do you teach in that school?

A. Yes; I am the principal.

Q. What do you teach?

A. I teach navigation, marine engineering, naval architecture and rules and regulations of the Coast Guard, which include safety and stowage of cargo, seamanship, nautical astronomy, meteorology and general——

Q. Captain Crawford, you mentioned that you

(Testimony of Lorkan Felim Crawford.)

have sailed on many kinds of ships. Can you tell us what kinds of ships you have sailed on? [204]

A. Do you mean types?

Q. Types, yes, please.

A. Steam vessels, motor vessels and sailing vessels.

Q. And have you ever had any experience with Victory ships? A. Professionally?

Q. Yes. A. No.

Q. Have you ever been aboard Victory ships?

A. Yes.

Q. Are you at all familiar with the construction and design of Victory ships? A. Yes.

Q. Now, in the course of your experience aboard ships, Captain Crawford, have you ever had occasion to observe or do you know if there was a custom with regard to accounting for men?

A. Yes. [205]

* * * * *

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury:)

Mr. Gallagher: If your Honor please, we didn't discuss this question of an alleged custom of conducting searches for crew members who might not show up for work while we were in chambers.

But I would ask your Honor to make the same order, with respect to this subject matter, as you did with reference to the comparison testimony, which had to do with the ladders and screens and so forth and so on.

(Testimony of Lorkan Felim Crawford.)

And that your Honor make an order that my objecting upon each ground which I referred to in chambers shall be deemed to physically appear in the record immediately following each question along this line of alleged question of searching for missing crew members, and immediately following each answer the record shall be deemed to physically show a motion to strike on the same grounds set forth in the objection. [206]

And I particularly call your Honor's attention to this proposition: When anybody is asked, "Is there a custom," he obviously forms his own conclusion with reference to whether there is a custom.

We think the evidence is entirely irrelevant and not within the issues pleaded. It is my understanding that when any custom is relied upon it must be pleaded. They don't claim this was a custom of the defendant.

The Court: The record will show that the objections are made as to each question upon this subject, and overruled, and a motion to strike made and denied, unless there be some actual presentation and ruling here to the contrary.

Mr. Gallagher: Is your Honor going to restrict this witness, in any event, to what he claims he observed before April 24, 1951, and is your Honor going to restrict him from using words like "safety precautions" and all that sort of thing?

You remember last time we tried this case he did use those expressions, which are purely conclusions.

The Court: I think that it is proper for him to

(Testimony of Lorkan Felim Crawford.)

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The Court: I think that it is proper for him to

(Testimony of Lorkan Felim Crawford.)

do so, if the questions are put to him. We can't require witnesses to not use words which are common nomenclature within the industry or field within which they are testifying.

The jury will be instructed, of course, insofar as conclusions are concerned, they are the ones to form conclusions, [207] except that they may accept the opinions of experts if the expert is shown to be an expert and the reasons given for an opinion are such as entitle it to acceptance by the trier of fact.

In short, I will give them the conventional instruction upon the limitations of expert testimony.

Mr. Gallagher: May the record also be deemed to physically include to any question, which asks him about safety precautions or a safety practice or safety measures or like phrases, an additional and specific objection upon the ground that that is incompetent evidence. It is not a subject of expert testimony, and it calls for a conclusion and opinion of the witness.

And that a motion to strike shall be physically deemed to be in the record following each answer that the witness may give on that subject or those subjects.

The Court: That is acceptable to this court.

Mr. Gallagher: And your Honor so makes such an order?

The Court: I do.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Proceed.

(Testimony of Lorkan Felim Crawford.)

Q. (By Mr. Simpson): Captain Crawford, just before recess I asked you a question which, if it will not inconvenience the reporter too much, I would like to have read, and your answer [208] to it read.

(The record was read.)

Q. (By Mr. Simpson): Captain Crawford, was such a custom in effect on April 24, 1951?

A. To the best of my knowledge and belief, yes.

Q. And what was that custom?

A. To account for the working hours and places of each member of the crew at all times.

Q. And from your experience, was there any custom to accounting for men who were missing?

A. Yes.

Q. And on April 24, 1951, was that in existence?

A. To the best of my knowledge and belief, yes.

Q. And what was that custom?

A. The custom was to determine when a man was assigned to any particular work that he performed that work so that an accounting could be kept in a logical way of his man hours.

Q. And if a man were missing, was there any custom for ascertaining his whereabouts?

A. A search of the vessel——

The Court: Well, the question is was there a custom.

The Witness: Yes. Excuse me, your Honor; yes.

Q. (By Mr. Simpson): Was that custom in existence on April 24, 1951?

(Testimony of Lorkan Felim Crawford.)

Q. Captain Crawford, in the course of your experience, you have observed any custom or do you know of any custom with respect to the illumination of areas, work areas aboard a ship, such as a masthouse? A. Yes.

Q. And what is that custom?

Mr. Gallagher: May we have the same objections?

The Court: Yes. It is understood the objection is a running objection to this line of interrogation.

Q. (By Mr. Simpson): What is that custom, Captain Crawford?

A. To thoroughly illuminate any area in which a man or men are working.

Q. Captain Crawford, I would like you, if you would, to step down from the witness stand and to look at Plaintiff's Exhibit 4.

Mr. Simpson: Your Honor, this will only take a second.

The Court: Move it over. Don't be too concerned with time.

Q. (By Mr. Simpson): I am showing you Plaintiff's Exhibit No. 4. I ask you if you can identify that for us.

A. It is a masthouse and it would appear to me that [212] this is a lock of some type (indicating).

Q. And what is this portion I am now pointing to at the upper center of Plaintiff's No. 4?

A. The cowl of the ventilator.

Q. Showing you Plaintiff's No. 7, I ask you how far down does such a ventilator go?

(Testimony of Lorkan Felim Crawford.)

A. The cowl should end at the top of the mast-house. The ventilator shaft continues to the compartments to be ventilated.

Q. Directing your attention again to Plaintiff's 4, with this open hatch door, I ask you, can you see the ventilator shaft? A. Yes.

Q. Where is it? A. There (indicating).

Q. Is that an open ventilator shaft?

A. No.

Q. What do you see?

A. I see a metal division which might be the side of the shaft, looking from here.

Q. Captain Crawford, also directing your attention down here to Plaintiff's No. 2, I ask you, can you identify these particular bars marked on the exhibit as rails? A. Identify them, yes.

Q. And what are they? [213]

A. Guard rails.

Q. In the course of your experience, observing that you have "AA", "AA" here, indicating rails going across, have you ever seen rails projecting in that area? A. No.

Q. Now, asking you another question, in the course of your experience, have you ever seen any other protective devices such as these guard rails around the ventilator shaft? A. Yes.

Q. What have you seen?

A. A screen, a heavy screen which excludes the danger.

Mr. Gallagher: Just a moment. I don't think the witness would be permitted by your Honor to ex-

(Testimony of Lorkan Felim Crawford.)

Q. Now, you say you were master of ocean going vessels during the last war? A. Yes.

Q. Were those also vessels built by the United States of America? [216] A. No.

Q. During the last war? A. No.

Q. Were they vessels which had been built prior to the last war? A. Yes.

Q. Well, you know that there were several types—I will withdraw that.

Captain, you have said that you are familiar with the Coast Guard rules and regulations.

A. Yes.

Q. Is it true that as a part of those regulations there is a yearly inspection of all steam cargo vessels conducted by the Coast Guard? A. Yes.

Q. And is it true that according to those regulations no steam vessel may be navigated or used as a cargo vessel on navigable waters of the United States without a certificate of inspection having been issued by the Coast Guard? A. Yes.

Q. Are those certificates of inspection standard? They are, aren't they, Captain? A. Yes.

Q. When did you start going to sea last, that is, what was the date that you started going to sea after the [217] commencement of the so-called World War II?

A. That I cannot recollect.

Q. Well, you remember that the Japanese bombed Pearl Harbor on December 7, 1941.

A. Yes.

Q. Was it after that that you went to sea?

(Testimony of Lorkan Felim Crawford.)

A. It was after that.

Q. And how long after that?

A. I would say——

Q. A year or——

A. I would say February of '42, or thereabouts.

Q. Now, how long before that had it been that you had last gone to sea on any ocean-going vessel?

A. Approximately two years.

Q. When did you stop going to sea altogether?

A. What you mean, Mr. Gallagher, is when did I actually cease to go on a ship?

Q. What I mean is this: When did you, for the last time, act in any capacity as a member of a crew or a licensed officer on any ocean-going vessel?

A. About January of 1943.

Q. And from January of 1943, up to date, have you acted as master of any ocean-going vessel?

A. No.

Q. Have you acted as a licensed officer upon any [218] ocean-going vessel? A. No.

Q. Have you acted as an unlicensed member of the crew of any ocean-going vessel? A. No.

Q. Have you been employed in any capacity aboard any ocean-going vessel since January of 1943? A. No.

Mr. Gallagher: If your Honor will bear with me just a moment.

You have seen this?

Mr. Simpson: Yes.

Q. (By Mr. Gallagher): Captain, I show you——

(Testimony of Lorkan Felim Crawford.)

Mr. Gallagher: This has already been marked for identification Defendants' Exhibit A, your Honor.

Q. (By Mr. Gallagher): Captain, I show you Defendants' Exhibit A for identification and ask you whether that appears to be a photostat of the standard certificate of inspection issued by the Coast Guard? A. Yes.

Q. That has reference to the Linfield Victory?
A. Yes.

Q. Owned by the United States of America, represented by the Department of Commerce?

A. Yes. [219]

Q. Date of expiration 17 July, 1951.

A. Yes.

Q. That would mean it was issued about a year before that, wouldn't it? A. Yes.

Q. And that is what is called a regular certificate of inspection?

A. Regular certificate of inspection.

Mr. Gallagher: I offer that in evidence, your Honor please, as Defendants' Exhibit A.

The Court: Received.

(The exhibit referred to, marked Defendants' Exhibit A, was received in evidence.)

Mr. Gallagher: In order to conserve the captain's time, I will ask leave to defer showing this to the jurors until a little later. Or do you want me to do it now?

The Court: You do it whenever you feel the proper presentation of your case requires.

(Testimony of Lorkan Felim Crawford.)

Mr. Gallagher: All right. We will ask the jurors to look it over.

Excuse me. Let's not do it now. It has too many things on here, you will spend 20 minutes reading it.

I will show it to you later.

Q. (By Mr. Gallagher): Captain, have you ever at any time stood on the deck of a Victory-type ship immediately [220] outside of the port portion of the masthouse No. 2 in daylight, with the access door open, and looked inside that masthouse for the purpose of ascertaining what you could see without any artificial illumination inside?

A. No.

Q. Now, you have referred in your direct examination to cowl ventilators. Would you mind stepping down here a moment? There are cowl ventilators shown in Plaintiff's Exhibits 7 and 8, aren't there, Captain?

A. Yes.

Q. Now, those cowl ventilators, insofar as the upper opening is concerned, are about 72 inches in diameter, aren't they?

A. Yes.

Q. And the lower opening, which is at the roof of the masthouse, is approximately 36 inches in diameter, isn't it?

A. Yes.

Q. And you will notice that there is a screen on the outer opening of the ventilator cowl, shown in these exhibits, Plaintiff's Exhibits 7 and 8; don't you see these screens (indicating)?

A. Yes.

Q. And there is another screen at the butt or

(Testimony of Lorkan Felim Crawford.)

lower end of the ventilator shaft, as it meets the roof of the masthouse? A. Yes. [221]

Q. And that is the screen which is shown here in Plaintiff's Exhibit No. 6, isn't it (indicating)?

A. Yes.

Q. Now, the inside of this ventilator cowl is hollow, isn't it? It looks like a tube? A. Yes.

Q. So that there is no obstruction to air or anything else, excepting the two screens, isn't that right? A. Yes.

Q. Captain, have you observed seamen working in the lower tween deck of a cargo vessel with hatches apparently substantially similar to the hatches shown in Plaintiff's Exhibits 7 and 8?

A. Yes.

Q. And when half of such a hatch cover is taken off, or the after end of a hatch cover is taken off, the natural light from the outside will go down into the hold, won't it? A. Yes.

Q. And you have observed seamen working in the daylight in such portions of holds, without anything, excepting the natural light which comes from the outside and goes through the opening in the hatch, haven't you? A. No.

Q. You never have? A. No. [222]

Q. When was the last time you watched any seamen working in the hold of a ship?

A. About a year ago on Terminal Island.

Q. What ship was it?

A. The J. L. Luckenbach.

Q. That is a C-3, isn't it?

(Testimony of Lorkan Felim Crawford.)

A. Yes; C-3 or C-4, I am not sure. I believe it was a C-3.

Q. How many decks are there below the main deck?

A. Possibly four, three or four.

Q. Where were these men working?

A. In the upper tween deck.

Q. Is that two decks below the main deck?

A. No, that is one deck below.

Q. One deck below the main deck. Did you go down in that area? A. No.

Q. What were you doing on the vessel?

A. The captain was going for a pilot's license. He was one of my students and I went aboard to see him.

Q. You went over and took a look at the cargo working?

A. Well, to go to the master's quarters it was necessary to pass this particular hatch, and I always am interested and look.

Q. How much of the hatch was open, what area in square [223] footage?

A. All of the hatch was open.

Q. What was the area?

A. I don't remember the area exactly, or even close——

Q. Was it about 30 feet wide and 50 feet long?

A. About that.

Q. So all of the hatch covers were off?

A. Yes.

Q. And it was broad daylight?

(Testimony of Lorkan Felim Crawford.)

A. It was broad daylight.

Q. And is it your testimony that enough natural light didn't get down into the deck, the second deck immediately within the square of the hatch, to enable you to see it?

A. No, that is not my testimony.

Q. And see the men down there. A. No.

Q. What was that?

A. That was not my testimony.

Q. What was the effect of the natural light?

A. They had two cluster lights in the after end of the hatch.

Q. How about the rest of the hatch?

A. There were no cluster lights there, to my knowledge.

Q. Would the natural light illuminate those portions of the hatch? Did you have any trouble seeing what was going [224] on down there?

A. No.

Q. The men were plainly visible to you?

A. You mean who were cleaning?

Q. The men who were working down there in the hold.

A. The stevedores were in the lower hold.

Q. What is that?

A. The stevedores were working in the lower hold.

Q. Could you see them? A. Yes.

A Juror: May I ask a question? You say "space." How far are they? I can't visualize 30 feet or 32 feet.

(Testimony of Lorkan Felim Crawford.)

Mr. Gallagher: Can we stipulate that this room is about, close to 50 feet wide? Does your Honor have the exact measurements?

The Court: No. I did have them and kept them for such a purpose. For three years no one used them and somehow they got thrown out.

Mr. Gallagher: Fourteen and a half yards, according to my steps.

Are you willing to accept that?

Mr. Simpson: I am willing to accept that approximation.

Mr. Gallagher: All right.

Q. (By Mr. Gallagher): So that when you say that the hatch cover was about 50 feet long, it was about longer than [225] this room is wide?

A. Yes, about.

Q. And when you say it was about 30 feet in width, you mean it was about from where you are sitting to where I am standing?

A. Yes, about that.

Q. One, two, three, four, five, six, seven, eight, nine; nine times three, 27 feet.

Mr. Gallagher: Are you willing to accept that?

Mr. Simpson: That nine times three is 27?

Mr. Gallagher: That I took nine steps, each one of them being approximately a yard?

Mr. Simpson: Yes.

Mr. Gallagher: Does that clear that up for you?

The Juror: Oh, yes.

Q. (By Mr. Gallagher): The longshoremen

(Testimony of Lorkan Felim Crawford.)

were working down in this hatch that you are talking about on the Luckenbach? A. Yes.

Q. Not seamen?

A. Longshoremen were in the lower hold.

Q. Well, who was some place else that you saw, if you saw anybody else?

A. They looked to me like they were the ship's crew in the after end of the hatch of the—in the after end of the upper tween deck. They may have been maritime ship [226] cleaners, for all I know. I don't know.

Q. Were they within the square of the hatch or were they under the wings?

A. They were abaft the square of the hatch, toward the after bulkhead.

Q. Just a minute. In plain English what does that mean? A. They were abaft——

Q. Abaft means after? A. Yes.

Q. And there is a cargo space in the hold which extends a considerable area on both sides of the square of the hatch and forward of the square of the hatch and after the square of the hatch, isn't that right? A. That is right.

Q. So it is like a box, we will say, a foot wide and foot and a half long, and there is a hole cut in the top of the box, which is not as big in area as the box itself? A. That is right.

Q. So that when you talk about the square of the hatch you talk about the space which is defined and delineated by the hatch coamings?

A. Right.

(Testimony of Lorkan Felim Crawford.)

Q. Then on each side of the square of the hatch there is cargo space under the deck? [227]

A. Yes.

Q. And at the forward end of the hold or cargo space there is space beyond the forward hatch coaming?

A. Right.

Q. And the same is true with the after coaming, with the after hatch coaming?

A. Yes.

Q. These sailors, you say you observed, was it in the after portion of the tween deck?

A. Yes.

Q. And they were under the deck covering itself then?

A. Right. I am not sure they were sailors, Mr. Gallagher.

Q. You just saw some individuals in there then?

A. Yes.

Q. But these men were not in the square of the hatch?

A. No.

Q. The longshoremen, those you knew were longshoremen, were down three decks below?

A. Right.

Q. Where were these two cluster lights?

A. They were leading over the after hatch coaming to the space where these men were cleaning the upper tween deck.

Q. That is, under the deck space?

A. Yes. [228]

Q. But there were no lights down where the longshoremen were?

A. Not that I could see.

(Testimony of Lorkan Felim Crawford.)

Q. And what were the longshoremen doing?

A. Discharging cargo.

Q. That was way down in the very bottom of the ship, wasn't it? A. Right.

Q. In working down there they were working with slings or cradles to either put cargo in or take it out? A. Right.

Q. And those platforms or cradles, or whatever you want to call them, were lifted out of the hold by the winch driver? A. Yes.

Q. And then he would lower these things back down? A. Yes.

Q. So that these longshoremen were working in that area with cargo, loading or unloading operations actually going on? A. Right.

Q. Captain, on all vessels, that is, all American vessels that you know anything about, does it frequently happen that men go to work aboard those vessels without signing articles, unless it is a foreign voyage or intercoastal?

A. You are speaking of recent years, Mr. Gallagher?

Q. Yes. [229]

A. Well, I believe there are cases where the vessel is running coastwise that they don't sign the formal articles, as we understand articles.

Q. That is what I am talking about, formal shipping articles? A. That is right.

Q. Formal shipping articles are required by statute? A. They are.

Q. With reference to foreign voyages and intercoastal voyages? A. Yes.

(Testimony of Lorkan Felim Crawford.)

Q. An intercoastal voyage would be from San Francisco to Baltimore, Maryland? A. Right.

Q. A coastwise voyage would be one from New York to Baltimore? A. Yes.

Q. And a coastwise voyage would be one from Los Angeles to San Francisco or Los Angeles to Portland or Los Angeles to Seattle or vice versa?

A. Right. [230]

* * * * *

The Court: The plaintiff starts out with presentation of the plaintiff's case and, ordinarily, we hear all the plaintiff's witnesses before hearing any defense witness.

It happens that Mr. Gallagher, who is defending the defendant in this case, has a witness from some place fairly remote from Los Angeles and that witness wants to get back to his work. So counsel have agreed he might be heard out of order, so this is a defense witness being presented at this time, but the plaintiff has not rested her case. [231]

KENNETH ALBERT WEBB

a witness called by the defendants, being first sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your name, sir?

The Witness: Kenneth Albert Webb.

Direct Examination

Q. (By Mr. Gallagher): Your name is Kenneth Webb? A. Kenneth Albert Webb.

Q. Where do you live, Mr. Webb?

(Testimony of Kenneth Albert Webb.)

A. 6116 Northeast 26th Avenue, Portland, Oregon.

Q. What is your occupation?

A. Marine surveyor.

Q. Employed by whom?

A. United States Salvage Association.

Q. Where are the headquarters of that association?

A. In New York City.

Q. How long have you been a marine surveyor?

A. Around nine years.

Q. Were you present aboard the Linfield Victory at the time Mr. George Weiss, one of plaintiff's attorneys, went aboard that vessel in May of 1952?

A. Yes.

Q. And who else was with the party? [232]

A. Mr. Walter Haines and a photographer.

Q. What is Mr. Walter Haines' business?

A. A marine surveyor in Portland, Oregon.

Q. In other words, he is in the same business you are in?

A. He is an independent surveyor.

Q. But he is a marine surveyor?

A. Yes, sir.

Q. Now, Mr. Webb, can you tell us what date that was in May?

A. May I use my notes?

Q. Do you have a memorandum you made close to that time?

A. Yes. That was 10:00 a.m. on May 10, 1952.

Q. And was it a clear day?

A. Yes.

Q. When you went aboard that vessel, did you

(Testimony of Kenneth Albert Webb.)

and Mr. Haines do anything together. Just answer that yes or no. A. Yes.

Q. And what was it that you did in conjunction with each other?

A. Measured the openings going down in the forward end of No. 3 hold and the after end of No. 2 hold on the lefthand side, looking forward.

Q. Did you measure the stanchions and the pipe railings? A. Yes, sir. [233]

Q. And other matters in and about the masthouse? A. Yes, sir.

Q. I show you here a diagram prepared by Mr. Haines—and we have agreed that it is accurate—that shows various measurements.

I don't want you to check them closely, but do they appear to you to be the measurements you and he took at the time? A. Yes, they do.

Q. All right. Now, at the time you and Mr. Haines took these measurements you were, I assume, inside the portion of the masthouse where the ventilator shaft and the escape shaft are located on the port side of masthouse No. 2?

A. Yes, sir.

Q. Was the access door, which is shown here in Plaintiff's Exhibit No. 3, open or closed when you and Mr. Webb were in there taking these measurements?

A. It was both opened and closed. We had it both opened and closed.

Q. While it was opened did you take any meas-

(Testimony of Kenneth Albert Webb.)

urements and make any notes of those measurements? A. Oh, yes.

Q. While the door was opened did you have any difficulty in seeing the figures on the rule or seeing any of the devices in and about the upper area of the masthouse? A. No. [234]

Q. Did you and Mr. Haines make notes in that masthouse with reference to your measurements, without any illumination, excepting that which came from the outside?

Mr. Simpson: Objected to as leading, your Honor.

Mr. Gallagher: I will withdraw it.

Q. (By Mr. Gallagher): Was there any—state whether there was or was not any artificial illumination inside the masthouse when you had the door open and you and Mr. Haines were measuring these things and making your notes.

A. As far as I can remember—I have no notes on that—there was a cluster light or a cargo light that was dropped down there during that period of time.

Q. Do you know where?

A. Down in the No. 2 hold, or into No. 2 ventilator.

Q. Up on top in the masthouse itself, what light did you have while making your measurements?

A. Well, you have the lights from the cowl ventilator and the door.

Q. Is that all? A. That is all.

Q. Were any lights installed in there at all until

(Testimony of Kenneth Albert Webb.)

after you and Mr. Haines got through with your measurements?

A. As far as I can remember—this is some time ago—I think we asked to have lights put in there.

Q. When? [235]

A. During the time of our survey.

Q. What were you able to see in that masthouse without artificial illumination with the door open?

A. You could see your hand rails, your protective hand rails around the No. 2 pipe, and your opening and your ladder leading down into the forward end of No. 3 hold on bulkhead 54.

Q. Was there any difficulty about observing those things without artificial illumination?

A. No, not any.

Q. What was done? Was there any light inside the masthouse with the door closed and when there was no artificial illumination in there on that day?

A. Yes.

Q. Where did that light come from?

A. That light come from the ventilator.

Q. That is the same ventilator cowl that Captain Crawford described? A. Yes.

Q. And would your description of that ventilator shaft, from having observed it personally, be the same as his? A. Very near, yes.

Q. Well, was there anything other than a hollow tube with a wire screen on both tanks?

A. No. [236]

Q. So the only thing to restrict the incoming of light from the outside would be the screens?

(Testimony of Kenneth Albert Webb.)

A. That is correct.

Q. You say you closed the masthouse door at a time when there was no artificial illumination in there? A. That is right.

Q. And when you did close the masthouse door, and without any artificial illumination inside the masthouse, what could you see just from the light that came through the ventilator cowl?

A. You could see your openings and your hand rails away down in the hold.

Q. Could you see the ladder, the top of it?

A. Yes.

Q. Could you see the hand rails or guard rails around the ventilator shaft, without any difficulty at all? A. Yes.

Mr. Gallagher: That is all.

Cross Examination

Q. (By Mr. Simpson): Mr. Webb, respecting the last question, you said you could see without any difficulty at all.

Did you mean by that that the light on the inside was the same as the light on the outside?

A. I did not. [237]

Q. Well, is it your testimony that light inside was diminished, and in order to do your surveying properly you needed lights?

A. Well, yes, I would say that.

Mr. Simpson: No further questions.

Mr. Gallagher: Just one or two more questions.

(Testimony of Kenneth Albert Webb.)

Redirect Examination

Q. (By Mr. Gallagher): Mr. Webb, when you were up there did you observe an electrical appliance outlet on the after bulkhead of the masthouse?

A. This plug-in, yes.

Q. Right there immediately to the left?

A. Right alongside the jumbo boom (indicating).

Q. That is the jumbo boom?

A. Yes, that is the jumbo boom and this is—that is it going up, and this is on the bulkhead right here (indicating).

Mr. Gallagher: Can we have that marked on this photograph No. 7, your Honor, so that the jurors will know what he is pointing to?

The Court: Yes, identify it so it will be clearly ascertainable from the complete record.

Mr. Gallagher: Mr. Simpson, would you come here, please, a moment?

I think we might be able to do it easier. [238]

Do you have any objection if I draw an arrow down there pointing to the outlet; this is the outlet here (indicating).

Mr. Simpson: None whatever.

Mr. Gallagher: Now, I have drawn an arrow on the Plaintiff's Exhibit No. 7, and at the head of the arrow I will write the letters "EO," to indicate electric plug outlet. Thank you.

Now, if your Honor please, I would like to let the ladies and gentlemen look at this certificate of

(Testimony of Kenneth Albert Webb.)

inspection,—we have got time—and point out on this photograph this electric appliance plug.

You see, this is the arrow. The head of the arrow points to the outlet (indicating), like your wall plugs at home.

The Court: You are not finished with this witness, are you, Mr. Gallagher?

Mr. Gallagher: Yes, your Honor. [239]

* * * * *

The Court: I have received the plaintiff's proposed jury instructions.

Mr. Gallagher: Yes. I have mine. I wasn't served a copy of his, so I didn't know he gave them to you.

The Court: He should serve you with a copy. I will be happy to have yours. [244]

Mr. Gallagher: I will give them to your Honor right now, and exchange with him. [245]

* * * * *

Mr. Simpson: The next witness called by the plaintiff is Doctor Frank Glauser, and his testimony will be by way of deposition.

This was taken on the 11th day of July, 1952. Mr. Gallagher has kindly consented to read the answers as I read the questions.

Mr. Simpson: "You are a medical doctor?"

Mr. Gallagher: "I am."

Mr. Simpson: "Where do you reside, Doctor?"

Mr. Gallagher: "639 Diamond Street, Philadelphia, Pennsylvania."

Mr. Simpson: "Where do you practice your profession?"

(Deposition of Dr. Frank Glauser.)

Mr. Gallagher: "Practice in Philadelphia."

Mr. Simpson: "And will you state, please, your educational background in the field of medicine?"

Mr. Gallagher: "Graduated from the University of Pennsylvania, 1923, interned at the Jewish Hospital, 1923 to 1924, Graduate School of Surgery, course in surgery, 1942 to 1943. Research surgery, 1946 to 1948, at the University of Pennsylvania, Harrison Department of Surgical Research. Master of Science degree, 1949. Diplomate of American Board of Surgery, 1948. Fellow, American College of Surgeons, 1952. Assistant professor of anatomy, Graduate School of Medicine, department of surgery. I am now coroner's physician, City of [255] Philadelphia. Commander, United States Navy, inactive reserve. I served in World War II 33 months from July, 1943, to March, 1946, overseas 15 months, South Pacific theater of war, 1944-1945."

Mr. Simpson: "When were you admitted to practice in Pennsylvania, Doctor?"

Mr. Gallagher: "1924."

Mr. Simpson: "How long have you held your present capacity, Doctor?"

Mr. Gallagher: "As coroner's physician, two and a half years."

Mr. Simpson: "You still occupy the same position?"

Mr. Gallagher: "Yes, sir."

Mr. Simpson: "For the purpose of refreshing your memory, Doctor, do you have before you any records of the coroner's office?"

(Deposition of Dr. Frank Glauser.)

Mr. Gallagher: "I do."

Mr. Simpson: "Are they official records?"

Mr. Gallagher: "They are official records."

Mr. Simpson: "Do those records disclose, Doctor, that on or about the 30th of April, 1951, the body of Nathaniel P. Hutchison was brought into the coroner's office?"

Mr. Gallagher: That is objected to on the ground the records would speak for themselves, if they were admissible. [256]

The Court: Is that an objection?

Mr. Gallagher: Yes, your Honor.

The Court: Sustained.

Mr. Simpson: "Did you examine this body?"

Mr. Gallagher: "I did."

Mr. Simpson: "When did you examine the body?"

Mr. Gallagher: "On the fifth month second, 1951."

Mr. Simpson: "Will you describe, please, the nature and extent of your examination?"

Mr. Gallagher: "Yes; 66 inches in height. Weight was approximated at about 165 pounds. External examination showed a hemorrhage under the scalp. The internal examination showed a fracture, left side of the skull, long linear fracture of the frontal, temporal and parietal bones.

"Opening the skull we saw subdural hemorrhage. The lungs were not noteworthy. The heart showed acute dilatations. The liver, stomach, kidneys and intestines were not abnormal.

(Testimony of Dr. Frank Glauser.)

“The bladder contained 40 cc of urine.”

May we stipulate that means cubic centimeters?

Mr. Simpson: So stipulated.

Mr. Gallagher:

“Cause of death, fractured skull, subdural hemorrhage. [257]

“This is countersigned by Chief Coroner’s Physician, W. S. W., which stands for William S. Wadsworth.”

Mr. Simpson: “In other words, these discoveries were made during the performance of an autopsy?”

Mr. Gallagher: “That is correct.”

Mr. Simpson: “And you say the finding as to the cause of death was a subdural hemorrhage?”

Mr. Gallagher: “Fractured skull and subdural hemorrhage.” [258]

* * * * *

Mr. Simpson: At this time, your Honor, counsel has agreed to stipulate to the introduction of the ship’s log, the SS Linfield Victory, and we would like to offer it as Plaintiff’s 15. [299]

Mr. Gallagher: That is correct, your Honor. But I think Mr. Simpson should make it clear that these are photostatic copies of the ship’s log commencing at midnight of April 16, 1951. In other words, you start with 0000 hours, dated April 17, 1951, and that is midnight.

Mr. Simpson: Correct.

Mr. Gallagher: And the entries go up to and including April 30, 1951. That is correct?

Mr. Simpson: That is correct.

Mr. Gallagher: No objection, your Honor.

The Court: Received into evidence.

(The document referred to was marked Plaintiff's Exhibit 15 and received in evidence.)

The Court: You may read any portion that you wish to particularly direct the attention of the jury.

Mr. Simpson: Now, I would like to call Mrs. Emma Hutchison to the stand.

EMMA HUTCHISON

called as a witness on her own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your full name, please?

The Witness: Emma Hutchison.

The Court: Please bear in mind it is a large courtroom, Mrs. Hutchison. The jury all want to hear your testimony, [300] so you will have to speak out with a little more force to your voice.

The Witness: All right. I shall.

Direct Examination

Q. (By Mr. Simpson): Mrs. Hutchison, where do you live?

A. I live at Avenal, California.

Q. What is your address in Avenal?

A. Box 1052 or 108 West Tennyson.

Q. For how long have you lived there?

A. Off and on since 1937.

Q. Mrs. Hutchison, are you the widow of Nathanael Patrick Hutchison, named in this action?

(Testimony of Emma Hutchison.)

A. Yes, I am.

Q. Will you tell me when you and Nathanael Patrick Hutchison were married?

A. November 4, 1940.

Mr. Simpson: Can all of you hear Mrs. Hutchison?

Q. (By Mr. Simpson): You will have to speak a little louder, please.

A. On November 4, 1940.

Q. Can you tell me what was Mr. Hutchison's work?

A. He was a steel worker or iron worker on construction iron work, and also worked in the oil fields and was a seaman.

Q. When did he do work as a seaman? [301]

A. He began in 1943, I believe.

Q. Do you remember the general kind of work that he did?

A. Able seaman and boatswain's mate and maintenance man. That is all I know.

Q. What kind of ships did he work on, Mrs. Hutchison?

A. Well, cargo ships would be all I could tell you. I don't know the different—

Q. Any particular line or lines?

A. He worked for different lines. He worked for, just offhand, Sudden & Christainsen, Moore McCormack, Pacific Far East, Burns Steamship.

Q. When was the last time that you saw your husband before his death in 1951?

A. About March 21, 1951.

(Testimony of Emma Hutchison.)

Q. What was the condition of his health at that time?

Mr. Gallagher: That is objected to, if your Honor please, upon the ground that it calls for a conclusion. If it purports to include the condition of his heart, that would require medical knowledge.

The Court: I think it is apparent that the question goes to the appearance of health, insofar as a layman might observe it.

Mr. Simpson: That is correct, your Honor.

The Court: The objection is overruled. [302]

Mr. Gallagher: In other words, just the things you can see from the outside?

The Court: Well, I suppose so, conversations, observations. It is a layman's opinion, without having made apparently a detailed inquiry.

Q. (By Mr. Simpson): You may answer, Mrs. Hutchison.

A. Well, I would say it was good. He had no—he slept well, ate well, was in good spirits.

Q. Any complaints ever made to you?

A. Not that I can recall.

Q. Now, Mrs. Hutchison, after his death were you appointed as administratrix of his estate?

A. Yes.

Mr. Gallagher: I will stipulate she was, and that she is.

Mr. Simpson: At this time, your Honor, we would like to offer into evidence then Letters of Administration as Plaintiff's next in order, whatever number that would be.

(Testimony of Emma Hutchison.)

The Clerk: 16.

Mr. Simpson: 16.

The Court: Received.

(The document referred to was marked Plaintiff's Exhibit 16 and received in evidence.)

Mr. Gallagher: This is offered for the sole purpose for proving Mrs. Hutchison was appointed?

Mr. Simpson: Precisely. [303]

Mr. Gallagher: No objection for that purpose. I stipulated to it, anyhow.

Q. (By Mr. Simpson): Mrs. Hutchison, on April 24, 1951, how old was your husband?

A. Forty-four.

Q. And on that particular day, what was your age? A. Fifty-three.

Q. Now, did you and Mr. Hutchison, respecting your income for 1950, file a joint return?

A. Yes, we did. We always did.

Mr. Simpson: Do you want to see this?

Mr. Gallagher: No objection.

Mr. Simpson: This has been marked, your Honor.

The Court: Are you offering it in evidence?

Mr. Simpson: I am wondering if it needs to be marked again for identification.

The Court: Just refer to it. The purpose for marking them is to get a means of identification.

Mr. Gallagher: It will have to be marked so it will go in sequence.

Mr. Simpson: Yes.

The Clerk: 17.

(Testimony of Emma Hutchison.)

(The document referred to was marked Plaintiff's Exhibit 17 for identification.)

Q. (By Mr. Simpson): Mrs. Hutchison, I show you a document [304] purporting to be an individual tax return by Emma E. and N. P. Hutchison, designated as Plaintiff's 17 for identification.

Mr. Gallagher: It is in evidence, isn't it?

Mr. Simpson: Not as yet.

Mr. Gallagher: I thought we stipulated it could go in.

Mr. Simpson: That is fine then.

Mr. Gallagher: You don't have to lay any further foundation for it.

The Court: Upon the stipulation, it is received.

(The document heretofore marked Plaintiff's Exhibit 17 was received in evidence.)

Mr. Simpson: Thank you, your Honor.

Thank you, Mr. Gallagher.

Q. (By Mr. Simpson): Mrs. Hutchison, did Mr. Hutchison in any way contribute to your support?

A. Yes, whenever he came off a trip he would give me around seventy-five percent or thereabouts of his money. And he kept the rest, and we decided where to put it and what to do with it.

Q. The jury cannot hear you.

A. I am sorry. I said he would give me around seventy-five percent of his wages and kept the rest and that—well, we disposed of it, however we did, in the bank or whatever we wanted to do with it. You know, like any other family does. [305]

Q. That was his consistent practice?

(Testimony of Emma Hutchison.)

A. Yes, it was. Of course, the trips were in between times and sometimes it would be three months, sometimes it would be two months, sometimes it would be only six weeks or a month.

Mr. Simpson: You may cross examine, Mr. Gallagher.

Cross Examination

Q. (By Mr. Gallagher): Mrs. Hutchison, your husband was away quite a bit of the time, wasn't he?

A. On and off, yes, whenever he was on the ships and working.

Q. So that you wouldn't know, would you, of your own knowledge,—by that I mean from having seen him do it—whether he had ever gotten a physical examination from a doctor while he was away from you?

A. I know he got them whenever he had to go on the ship, because they have to get them whenever they go to work on a ship; they have to get a physical examination.

Q. Were you ever present at any time when he had an examination?

A. No, of course, I wasn't there then.

Q. Were you present at any time when he may have gone to a private physician for an examination?

A. Well, I believe I was one time in Avenal. He had a [306] bad cold——

Q. I am not asking you what he had.

A. Well, he did. That is the only reason I can tell you, he had a bad cold and he called the doctor and he just checked him over.

(Testimony of Emma Hutchison.)

Q. He called a doctor?

A. Yes, he did. He checked him over for a cold. He gave him a prescription for it.

Q. Is that the only occasion you know of when he called a private physician or went to see a private physician? A. I believe it is.

Q. Now, Mrs. Hutchison, did Mr. Hutchison have any relatives in Baltimore, Maryland?

A. No, he did not.

Q. Did you? A. No, sir.

Q. Did you have any friends there, that you know of? A. Not that I know of.

Q. Did Mr. Hutchison have any friends in Baltimore, that you know of?

A. Not that I know of; not that I could tell you.

Q. Prior to the time you married Mr. Hutchison, had been married to a man named McFee, who died? A. Yes, I was.

Q. And how many children do you have as a result of [307] the marriage to Mr. McFee, and what are their ages?

A. I have five living and I have three small ones that died when they were children, babies.

Q. You have five living? A. Yes, sir.

Q. Now, you said that Mr. Hutchison had been a steel worker. A. Yes, sir.

Q. Would you please tell us what you meant by that, Mrs. Hutchison? What did he do in connection with steel?

A. Well, you know, when they go to build bridges and things they put little iron bars—I am

(Testimony of Emma Hutchison.)

not very good at this. And they wire them together and it is the construction that is put in before the steel is put in, before you pour the concrete into it.

Q. You mean putting pieces of steel——

A. Whenever they build bridges or build big buildings they have these little pieces of steel they put in and wire them, and put them in different places, and then pour the concrete in.

Q. He was a structural steel worker?

A. That is correct, sir.

Q. He worked not only on the ground but high up on the buildings in the course of construction?

A. Yes, sir. [308]

* * * * *

Mr. Simpson: With respect to admissions, your Honor, it had been the plaintiff's desire to offer in evidence the following portion of the admission to plaintiff's request for admissions designated as 1c.

The Court: You had better read it, because I don't have it immediately before me.

Mr. Simpson: The admission was, that the defendant admit that "on April 24, 1951, there were no permanent electrical installations of any kind whatsoever, which could be used for furnishing artificial illumination, in the masthouse enclosing the ventilator shaft on the SS Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found."

The portion we would offer into evidence is the following, in answer to that, appearing on page 3 of the defendant's reply:

“On April 24, 1951, there were no permanent electrical installations inside that portion of the masthouse enclosing the ventilator shaft on the steamer ‘Linfield Victory’ in which the body of Nathanael Patrick Hutchison was found on April 30, 1951.”

We would not care to offer the balance of the statement, which we consider to be argument by the defendant, which reads:—

The Court: Don’t read it. We will see if there is an objection to this.

Mr. Gallagher: I object to the introduction of the request for the admission, and I object to the introduction of either part or all of the reply to request 1c., upon the [329] ground that there is no evidence in this record, direct or indirect, showing that at any time when Nathanael Patrick Hutchison could have been within the area of masthouse number two, in the course of his employment, there was any necessity for any artificial light of any kind or character.

There is no evidence whatever that the masthouse door was closed at any time between 8:00 A.M. on April 24, 1951, and 12:30 P.M. on the same date.

I call your Honor’s attention to *Smith v. Acadia Overseas Freighters*, 202 Fed. (2d) 141, where the court says:

“The record is both meager and chaotic. It is not clear at what time of day the accident occurred; whether during the daytime or after dark. * * * The time of day when the accident occurred is material for it has direct bearing on the issue of the degree

of lighting in the hold and hence on the liability of the ship. The lighting in the hold is relevant to the issue of whether the libelant was able to see that the hooks on the extension ladder were defective * * * It also does not appear whether lights were or were not necessary for we cannot be certain at what time, in daylight or darkness, the accident occurred."

As a further ground of my objection, there is no evidence, direct or indirect, showing the time of day when Nathanael [330] Patrick Hutchison got into the ventilator shaft. Neither is there any evidence, direct or indirect, showing the date upon which he got into the ventilator shaft, to wit, whether it was the 24th of April or the 25th of April.

And there is no evidence, direct or indirect, showing, or from which a jury could find that he got into that ventilator shaft or went into the mast-house at the time he got into the ventilator shaft, in the course of his employment.

The complaint alleges in Paragraph VII that Nathanael Patrick Hutchison was in the employ of the defendant on April 24, 1951, and the answer of the defendant denies that Nathanael Patrick Hutchison was in the employ of the defendant at any time on April 24, 1951, after 12:30 P.M.

And there is no proof in the record, direct or indirect, that he was an employee of the defendant at any time after 12:30 P.M. on April 24, 1951.

Now, certainly, and in addition to that, the question that Mr. Simpson refers to in his request—

and without waiving the foregoing objections or any of them, I want to call your Honor's attention to the scope of the request—"On April 24, 1951, there were no permanent electrical installations of any kind whatsoever, which could be used for furnishing artificial illumination, in the masthouse enclosing the ventilator shaft on the SS Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was [331] found."

Now, Mr. Simpson wants the court to decide for the defendant what its admission is. Now, the defendant answered that request as follows:

"On April 24, 1951, there were no permanent electrical installations inside that portion of the masthouse enclosing the ventilator shaft on the steamer 'Linfield Victory' in which the body of Nathanael Patrick Hutchison was found on April 30, 1951."

Your Honor will notice that the request for admission does not refer to "permanent". It just refers—yes, it does, "permanent electrical installations of any kind whatsoever, which could be used for furnishing artificial illumination,".

The defendant's response to the request continues as follows:

"There was a permanent electrical installation consisting of electric current outlets permanently installed on the after bulkhead of said masthouse and within 55 inches of the door leading into that portion of the masthouse enclosing said ventilator shaft, and the said permanent electrical installation could have been used on April 24, 1951, if neces-

sary, for furnishing artificial illumination in the masthouse enclosing the ventilator shaft on the steamer 'Linfield Victory' in which the body of Nathanael Patrick Hutchison was [332] found on April 30, 1951."

And in that connection I call your attention to the testimony which shows that the electric outlet referred to in that admission is shown on Plaintiff's Exhibit Number 7 on the after bulkhead of the masthouse, a place to plug in.

I also call your Honor's attention to the fact that in Plaintiff's Exhibit Number 4 you see a floodlight, a portable floodlight in the locker on the starboard side of the masthouse.

The Court: Have you finished the objection?

Mr. Gallagher: Yes, your Honor.

The Court: Overruled.

Mr. Simpson: Your Honor, the next admission which the plaintiff would offer into evidence is the admission designated as 1f., in which the defendant states on page 4, "Defendant admits that during the month of April, 1951, pursuant to bareboat charter agreement (Contract No. M.A. 14) with the United States of America, it was operating and managing the steamer or steamship 'Linfield Victory', in its intercoastal service."

The balance of the admission we do not offer.

The Court: Is there any objection?

Mr. Gallagher: Yes, your Honor. I object to the admission because it shows on its face that the entire possession of the vessel by the defendant was pursuant to a bareboat [333] charter agreement,

Contract No. M.A. 14, a written contract between the United States government and the defendant.

Now, when you refer to a written contract in any answer the contract becomes necessary, in order to ascertain the scope of the operation or management of the vessel, when the answer says that the only operation or management of the steamer was pursuant to a written agreement.

Now, the balance of that answer excises one portion of the written contract. I have got the whole contract here. And that would be only for the court, not for the jury.

The court would take the contract, the bareboat charter and determine from it, in the absence of latent or patent ambiguities that might raise statements of fact, and require the introduction of evidence, what the right of the defendant was and how far it had any right to operate or manage the vessel.

See, this contract, your Honor, you can see in the admission that we show what we mean, "Defendant denies that it had unlimited control over the steamship Linfield Victory". That was one of the questions.

The request for admission is as follows:

"At all times during the month of April, 1951, pursuant to bareboat charter agreement (Contract No. M.A. 14) with the United States of America, you were operating, controlling, and managing the steamship, SS Linfield Victory." [334]

Your Honor will notice that in the answer the defendant denies the statement that it had un-

limited control over the steamer Linfield Victory, and in this respect alleges that clause 11, Part 2 of said bareboat charter agreement provided as follows:

“‘Structural changes. The charter shall make no structural changes in the vessel and shall make no changes in the machinery, boilers, appurtenances or spare parts thereof without in each instance first securing the written approval of the owner.’ The owner of said vessel was, at all times mentioned herein, the United States of America, Department of Commerce, Maritime Administration.”

Your Honor will see they, in their request, pinned it to this written contract.

The Court: Objection overruled.

Mr. Simpson: Your Honor, the next admission that plaintiff would offer is designated as 1g. on page 4:

“Defendant admits that all times between April 1, 1951, and October 13, 1952, it was doing business within the southern district of California, Central Division.” [335]

* * * * *

Mr. Gallagher: At this time, if your Honor, please, the defendant offers request for admission on page 2 reading as follows:—

The Court: An admission made by the defendant?

Mr. Gallagher: A request and a response to it.

The Court: I just want to keep it clear.

Mr. Gallagher: “On April 24, 1951, you provided no temporary electrical installations of any

kind whatsoever which could be used for furnishing artificial illumination in the masthouse enclosing the ventilator shaft on the SS Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found."

The Court: I am sorry, Mr. Gallagher, the Bailiff needed to ask me a question and I lost some of your reading.

Mr. Gallagher: The plaintiff requested the defendant to admit that the following statement is true, to wit:

"1d. On April 24, 1951, you provided no temporary electrical installations of any kind whatsoever which could be used for furnishing artificial illumination in the masthouse enclosing the ventilator shaft on the SS Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found."

Now, the answer to that one is on page 3:

"1. (d) Defendant, by reference thereto, [337] incorporates herein its answers to purported statements 1(a), 1(b), and 1(c) with the same effect as though said answers were, and each thereof was, repeated in detail herein."

Now, with reference to 1b:

"Defendant cannot truthfully admit or deny the purported statement contained in 1(b) for the reason that there were portable lighting appliances and devices, other than fixtures, which on April 24, 1951, could have been stored in the masthouse enclosing the ventilator shaft on the steamer 'Linfield Victory' in which, on April 30, 1951, the body of

Nathanael Patrick Hutchison was found, or such appliances or devices could have been stored, if not being stored in said portion of the masthouse, in other portions of the masthouse immediately adjacent to that part of the masthouse enclosing said ventilator shaft."

And this part of the answer to 1c:

"There was a permanent electrical installation consisting of electric current outlets permanently installed on the after bulkhead of said masthouse and within 55 inches of the door leading into that portion of the masthouse enclosing said ventilator shaft, and the said permanent electrical installation could have been used on April 24, 1951, if necessary, for furnishing artificial illumination in the [338] masthouse enclosing the ventilator shaft on the steamer 'Linfield Victory' in which the body of Nathanael Patrick Hutchison was found on April 30, 1951."

That is taken from the answer to request 1c. And both of those portions are adopted by reference in answering request 1d.

The Court: I am not able to recall at the moment what the rule is with respect to a party who has been asked to make admissions, offering those admissions, or the answer to request for admissions, where the party, who has asked them has not done it.

That is, is the right to offer the answers to requests for admissions solely that of the party who made the request for admissions or does the party who answered the requests for admissions have the

right to make the offer into evidence, or to have the answer to the request for admissions received into evidence as part of his case? What is the rule on that?

Mr. Simpson: I can't answer that, your Honor. I think it is at the very end of rule 36, if I am not mistaken. But I don't recall precisely what it says.

The Court: Do you have rule 36 there?

Mr. Simpson: No, I do not, your Honor.

Do you, Mr. Gallagher?

Mr. Gallagher: No. It is in your Honor's rules of civil procedure. But it is no different than [339] a deposition would be, no different than interrogatories.

And the rules provide that interrogatories can be used for any purpose for which you might take a deposition.

We don't believe that the court has the right to delete from the language chosen by the defendant, in answering any request for admission, any part or portion thereof, but your Honor has done that at the request of the plaintiff.

In other words, when you make an admission you are entitled to qualify it.

The Court: I haven't done that. I have simply granted permission to Mr. Simpson, or, I have admitted into evidence the part he has offered. I didn't say the other was rejected.

If you want it read you make your offer.

Mr. Simpson: Your Honor, may I state an objection respecting the offer by Mr. Gallagher, with

respect to 1d, irrespective of what the rule might say.

The Court: Yes.

Mr. Simpson: I would object to it being offered on the ground that the defendant starts his answer to the requested admission with the statement that "Defendant cannot truthfully admit or deny" and then goes ahead to explain why they cannot admit or deny.

And if they cannot admit or deny truthfully, then I would say that the explanation as to why they cannot do that would not constitute an admission and should not be admissible. [340]

Mr. Gallagher: I agree with that, but in the answer to 1c there is no statement that the defendant cannot truthfully admit or deny that request 1c.

And your Honor permitted Mr. Simpson to introduce only the first sentence in the answer to 1c. I contend, on behalf of the defendant, that without waiving our objections as to relevancy, which I have stated in detail about course of employment and time when the accident happened, and no foundation with reference to the condition of visibility in the masthouse, at any pertinent time I contend, without waiving those objections, that the court is without right to permit the plaintiff to read a part of an admission when the defendant under oath specifies qualifications to the part which is offered.

And I would request your Honor to compel the plaintiff, if he reads any of admission to request 1c that he read all of it.

The Court: Would you read it all, Mr. Simpson, as it exists? I mean now, so I will——

Mr. Gallagher: I will give it to your Honor.

The Court: I do not have it before me.

Mr. Gallagher: Here's my copy, your Honor. It is this one here, 1c (indicating).

The Court: What was the request, Mr. Simpson?

Mr. Simpson: The request was we be permitted—— [341]

The Court: What was the request for admission, 1c? It is not set forth in the reply.

Mr. Simpson: Yes, sir. The request that they admit, "On April 24, 1951, there were no permanent electrical installations of any kind whatsoever, which could be used for furnishing artificial illumination, in the masthouse enclosing the ventilator shaft on the SS Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found."

Mr. Gallagher: And the last part of the admission shows there was a permanent installation, which could have been used to furnish artificial light in the masthouse.

The Court: The motion of the defendant that all admission 1c be read is granted.

Where I have granted Mr. Simpson's motion and overruled your objection, Mr. Gallagher, I have intended only to rule that the portions he offered were admissible and not to rule affirmatively that the portions he had not offered were not.

Mr. Gallagher: I did not understand that, your Honor. I am sorry, I didn't get it correctly.

The Court: You are being very precise in your objections and requirements of the court's rulings so I am going to undertake to rule with exactness where I can.

Mr. Gallagher: Well, then, we had another one where you offered only part of it, isn't that right, Mr. Simpson? [342]

Mr. Simpson: That is 1f.

Mr. Gallagher: 1f. That is the one where the plaintiff requested the defendant to admit the following statement to be true:

"At all times during the month of April, 1951, pursuant to bareboat charter agreement (Contract No. M.A. 14) with the United States of America, you were operating, controlling, and managing the steamship, SS Linfield Victory."

Now the answer to that request, as set forth in the defendant's verified answer is as follows:

"Defendant admits that during the month of April, 1951, pursuant to bareboat charter agreement (Contract No. M.A. 14) with the United States of America, it was operating and managing the steamer or steamship 'Linfield Victory', in its intercoastal service. Defendant denies that it had unlimited control over the steamer 'Linfield Victory' and in this respect alleges that Clause 11, Part 2 of said *bareboard* charter agreement provided as follows: 'Structural changes. The charterer shall make no structural changes in the vessel and shall make no changes in machinery, boilers, appurten-

ances or spare parts thereof without in each instance first securing the written approval of the owner.' The owner of said vessel was, at all [343] times mentioned herein, the United States of America, Department of Commerce, Maritime Administration."

Now, all of that answer is relevant to the question of operation, control and management.

When the plaintiff requests us to admit the operation, management and control, pursuant to a written agreement, we are entitled to qualify that answer and show any part of the written agreement which is relevant to that matter of control.

And that particular part of the bareboat charter agreement shows that this defendant had no legal right to make any structural changes in this vessel.

The Court: Do you think that that would mean they won't have the right to install a protective device of some kind, so that men wouldn't fall down hatches or holes?

Mr. Gallagher: I contend, for example, to be specific about it, that the defendant, pursuant to that contract with the United States of America, had no right whatever to place any structural changes or create any structural changes in that masthouse.

Now, if we are talking about temporary things, like if you go to the hardware store and buy a bird screen and toss it in there, that wouldn't be a structural change. But this bareboat charter refers to structural changes.

Mr. Simpson: Your Honor, might I state an objection? [344]

The Court: Certainly.

Mr. Simpson: An objection regarding the plaintiff's reluctance to read this latter part, or portion, offered by Mr. Gallagher.

We would object to being required to read it, first, because we have requested an admission in the first sentence Mr. Gallagher or the defendant makes——

Mr. Gallagher: That is not true.

Mr. Simpson: ——but in the language, “Defendant admits that during the month of April, 1951, pursuant to bareboat charter agreement (Contract No. M.A. 14) with the United States of America, it was operating and managing the steamer or steamship ‘Linfield Victory’, in its intercoastal service.”

Then he adds, “Defendant denies”.

We are willing to read the admission of the defendant, and the court has ruled we should read the entire admission, with the qualification, when he goes on to expressly take the antithesis or make a denial, we feel that would be an imposition on the plaintiff, which would rob of it any benefit from the admission.

The Court: I don't see benefit from the admission, anyway.

Do you still want to read the portion you offered?

Mr. Simpson: I will state this for the record: I had no intention of reading or presenting this [345] to the jury. The only one I am going to present is

the one I have referred to, which is included as an instruction, regarding the lights, but I at least wanted to offer into evidence——

The Court: The court takes notice of the contents of these files. There is no purpose in offering things into evidence which you are not intending to present to the jury, because the court is the judge of the legal questions. And admissions are always before the court, aren't they?

Mr. Gallagher: I don't think so, your Honor, for this reason: If they were, then the court could use anything in the file in instructing the jury, or in making determinations in its own mind.

That would deprive the defendant of knowing just what the court was going to use, or what the court was going to permit the jury to use by way of instructions.

It would prevent the defendant from making his objections. It would prevent the defendant from permitting the court *ex mero motu* in deleting or emasculating the substance of an admission, which is in the form of pleadings and under oath.

That is why I say your Honor cannot take judicial notice of these requests for admissions or the admissions, without notifying the defendant just what parts you are going to consider and what parts you are not, so we have an opportunity to object, if there are any valid objections to it, with respect to that course of intended conduct on the part of the court. [346]

The Court: The court holds as to admission 1f, that the words "Defendant admits that during the

month of April, 1951, pursuant to bareboat charter agreement (Contract No. M.A. 14) with the United States of America, it was operating and managing the steamer or steamship 'Linfield Victory', in its intercoastal service" constitutes the admission.

That the other matter is a gratuitous addition, which has no part, no proper part in the answer or in the making of that particular admission that was requested.

Mr. Gallagher: In this connection, your Honor, I now offer as an exhibit for the consideration only of the court photostatic duplicate of Contract Number M.A. 14, to wit, the one referred to in the request for admissions.

The Court: That will be received. It is a little out of order, since we are still hearing the plaintiff's case, but I will receive it.

Mr. Simpson: Upon this there will be no controversy. Just for the record, the plaintiff would like to withdraw proposed instruction number 11.

The Clerk: Defendant's B.

(The document referred to was marked Defendant's Exhibit B and received in evidence.)

Mr. Gallagher: You mean 11 of your proposed instruction or just that one? [347]

Mr. Simpson: Proposed instruction number 11.

Mr. Gallagher: Now, I trust your Honor would enjoy a recess, not that you need it, but perhaps it might be in order. We can't get through today, anyhow, now.

The Court: Yes. I wish counsel on both sides would give realistic estimates of the time required

for these proceedings out of the presence of the jury. It is very irksome to be called in at 10:00 o'clock and then not get into the courtroom until after 11:00, which is going to be the case today.

We have had a lot of delay with this jury. It is a common vice of lawyers, not just you, to figure, "Well, I can handle this uninterrupted, if it is done right, in ten minutes" but to not take into consideration either the density of the judge or your opposition or the objections that they might legitimately offer to what you intend to do, or the various questions which are likely to occur.

Now, I don't want to rush you on these things, and I don't want to invite undue delay either, but it is a hardship,—not a serious one—but nonetheless an irritating hardship on the jurors, and it is well for all litigants to keep the jury from being irritated, if possible.

Mr. Gallagher: Were it not for this second Glauser deposition and the Daly deposition, I think we could easily finish all of the evidence today, because, as I understand it, Mr. Simpson is through with the exception of reading the testimony [348] of John Hutchison and whatever your Honor finally admits with reference to the Glauser and the Daly depositions.

Isn't that so?

Mr. Simpson: That is so.

The Court: We can't do it today. We will take the morning recess.

(Short recess taken.)

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Good morning. I am sorry I told you to be here at 10:00, when we couldn't reach the jury phase of the case until almost ten after 11:00.

We can't always foresee these legal problems, and the time they will require, with exact certainty.

The jury being present, counsel here, you may proceed.

Mr. Simpson: The plaintiff at this time will read into evidence the testimony of John Hutchison. Mr. Gallagher will be reading the answers of the witness John Hutchison and I will read the questions to him.

Mr. Gallagher: We can stipulate this was testimony given on direct?

Mr. Simpson: That is correct. [349]

JOHN HUTCHISON

Mr. Simpson: "Where do you live, Mr. Hutchison?"

Mr. Gallagher: "Long Beach."

Mr. Simpson: "What is your business?"

Mr. Gallagher: "I have a mailing and addressing firm."

Mr. Simpson: "Are you related to the deceased?"

Mr. Gallagher: "I am."

Mr. Simpson: "What is that relationship?"

Mr. Gallagher: "I am his brother."

Mr. Simpson: "When did you last see your brother?"

Mr. Gallagher: "About a month before he died."

Mr. Simpson: "Upon that occasion what did you observe the condition of his health to be?"

(Testimony of John Hutchison.)

Mr. Gallagher: "It was good; very good."

Mr. Gallagher: And I assume, your Honor, that is limited to what could have been observed by a person.

The Court: I am sorry. I was reading a note from the clerk.

Mr. Gallagher: I am sorry. Your Honor, the question was asked, "Upon that occasion what did you observe the condition of his health to be?"

The witness said, "It was good; very good."

I request your Honor to limit, the effect of that answer, the same as you did with Mrs. Hutchison, to what you could observe, what a layman could observe from the outside.

The Court: I think that the jury will [350] understand that is all a lay witness could undertake to answer.

Mr. Simpson: "Mr. Hutchison, directing your attention to the day of May 25, 1951, do you recall the events of that day?"

Mr. Gallagher: "On or about that time together we visited the Linfield Victory."

May we stipulate, Mr. Simpson, you were asking the questions?

Mr. Simpson: Correct.

"Upon arriving at the ship, what did you do?"

"Will you answer the question, what you observed?"

Page 35, line 10.

Mr. Gallagher: Well, page 34 is a little colloquy at lines 20 to 22, which pinpoints the date.

(Testimony of John Hutchison.)

Mr. Simpson: "What was the day we are inquiring about now?"

Mr. Gallagher: Mr. Simpson said, "May 27, 1951."

Mr. Simpson: "Will you answer the question, what you observed?"

Mr. Gallagher: "A guard at the top of the gangplank, a man in a uniform."

Mr. Simpson: "After boarding the ship, Mr. Hutchison, did you go into the area where your brother was found?"

Mr. Gallagher: "I did."

Mr. Simpson: "What did you observe there?"

Mr. Gallagher: "In the space that has been described as the masthouse, I saw the ladder and I saw the rail and the ventilating shaft; I saw the door."

Mr. Simpson: "Did you observe anything else about the condition of the masthouse?"

Mr. Gallagher: Your Honor please, the last part of the answer commencing with the disjunctive "or" at the top of page 37 I move to strike upon the ground that it states a conclusion and opinion of the witness.

The Court: The motion is denied. It will be understood that, of course, this is a layman's report of a layman's observation. It is not intended to be an expert opinion.

Mr. Gallagher: "We had the door opened and saw that there were no light fixtures or evidence of any light in there."

(Testimony of John Hutchison.)

"We saw the man introduced as the First Mate."

Mr. Simpson: The court now asks some question of the witness commencing at page 43.

"In the interest of expediency only, I will try to put a few questions.

"Did you go inside that masthouse?"

Mr. Gallagher: "Yes, sir."

Mr. Simpson: "What time of the day or night was it?"

Mr. Gallagher: "It was—" no, excuse me. "In the morning, before noon." [352]

Mr. Simpson: "What is it a day of obscurity, that is, a cloudy, dark day, or a bright day?"

Mr. Gallagher: "It was a sufficiently light day. It was a bright day."

Mr. Simpson: "Did you go inside the mast-house?"

Mr. Gallagher: "I did."

Mr. Simpson: "When you got in, did you close the door, or was the door closed or open at all times?"

Mr. Gallagher: "We opened the door to get in."

Mr. Simpson: "Did you close the door after you went in?"

Mr. Gallagher: "Yes, we did."

Mr. Simpson: "Did you see around?"

Mr. Gallagher: "No light on, no, sir."

Mr. Simpson: "What was the condition of visibility?"

Mr. Gallagher: Keep on going.

Mr. Simpson: "'No light, no, sir,' might be

(Testimony of John Hutchison.)

taken to mean there was not any light fixture or open window or anything of that kind, but could you see your hand before your face at two feet?"

Mr. Gallagher: "Not when the door is closed, no."

Mr. Simpson: "Was there any window in the masthouse?"

Mr. Gallagher: "No windows."

Mr. Simpson: "Was there any transom or skylight in the masthouse?" [353]

Mr. Gallagher: "No transom or skylight."

Mr. Simpson: "Could you see a light coming in through the crack of the door?"

Mr. Gallagher: "No light coming from the door."

Mr. Simpson: "You mean to tell us it was absolute darkness when the door was closed?"

Mr. Gallagher: "That is right."

Mr. Simpson: "You had to go through the door to get in?"

Mr. Gallagher: "Yes."

Mr. Simpson: "So you saw inside that masthouse when the door was at least partly open, did you?"

Mr. Gallagher: "That is right."

Mr. Simpson: "Did you see into that masthouse when the door was fully open?"

Mr. Gallagher: "Yes, practically when I am at right angles to the masthouse."

Mr. Simpson: "Could you see around pretty

(Testimony of John Hutchison.)

well when the door was open when you were in the masthouse? Couldn't you see around the masthouse all right?"

Mr. Gallagher: Would you please read that question over, Mr. Simpson?

Mr. Simpson: "Couldn't you see around pretty well when the door was open when you were in the masthouse? Couldn't you see around the masthouse all right?" [354]

Mr. Gallagher: "As soon as your eyes become accustomed to the relative darkness inside coming from the sunlight outside, it was easy to see."

Mr. Simpson: "You mean that it was like any enclosed room when you open a door and you are coming in from a bright light, you have to get accustomed to the darker light?"

Mr. Gallagher: "That is right."

Mr. Simpson: "To what parts——"

Mr. Gallagher: No, there is another question at line 21. Wait a minute.

Skip that one, that is right.

Mr. Simpson: "To what parts of the masthouse did you go?"

Mr. Gallagher: "I was in all parts of the particular section of the masthouse."

Mr. Simpson: "Did you see any ladders?"

Mr. Gallagher: "Yes."

Mr. Simpson: "When the door was open, you could see those ladders all right?"

Mr. Gallagher: "Yes."

(Testimony of John Hutchison.)

Mr. Simpson: "When the door was closed, could you see them?"

Mr. Gallagher: "No."

Mr. Simpson: "When the door was halfway open, could [355] you see them?"

Mr. Simpson: "Yes; any light would show the ladders."

Mr. Simpson: "Did you see any electrical conduits on the walls or ceiling of that masthouse?"

Mr. Gallagher: What page is that?

Oh, I see.

Mr. Simpson: 46.

Mr. Gallagher: "No, sir."

Mr. Simpson: "In your lifetime you have seen walls and ceilings where there had been light fixtures that had been removed, and you could see the scars on the walls or ceilings; do you know what I mean?"

Mr. Gallagher: "Yes."

Mr. Simpson: "Did you see anything of that kind in that masthouse?"

Mr. Gallagher: "I did not."

Mr. Simpson: "Well, did you look for it?"

Mr. Gallagher: "Yes, I did."

Mr. Simpson: The court says, "You may take over." [356]

* * * * *

RAYMOND C. SIMPSON

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your full name, sir.

The Witness: Raymond C. Simpson.

Direct Examination

Q. (By Mr. Gallagher): Mr. Simpson, you are a regular member of the State Bar of California?

A. Yes.

Q. And ex officio a member of the bar of this court as well? A. That is correct.

Q. Now, Mr. Simpson, did you at any time receive a copy of the shipping articles which covered the intercoastal voyage of the Linfield Victory from San Francisco to the east coast and return? [360]

A. Of my own knowledge I do not recall such; my office may have.

Q. Did you at any time receive from me the names and addresses of the members of the crew of the Linfield Victory? A. Yes, I did.

Q. Can you tell us whether you received that information over three years ago?

A. Yes, more than three years ago.

Q. In other words, you got the names and addresses of all of the unlicensed crew members?

A. That is correct.

Q. And also the names and addresses of all of the officers in the deck department?

A. At least, it purported to be complete. [361]